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No. 12529

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK WALLACE and R. M. MAKEMSON, doing business as Wallace and Wallace, a partnership,

Appellees.

Transcript of Record

Appeal from the United States District Court,
District of Arizona.

FILED

JUL 10 1950

PAUL P. O'BRIEN,
Clerk

No. 12529

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Additional Designation of Record	40
Amended Supplemental Statement of Proceedings	41
Answer	26
Attorneys of Record	1
Clerk's Certificate to Record on Appeal	42
Complaint	4
Decree of Preliminary Injunction	24
Designation of Record	35
Filings—Proceedings	2
Findings of Fact and Conclusion of Law Upon Motion for Preliminary Injunction	21
Judgment	32
Local Court Rule No. 14	28
Minute Entries:	
February 2, 1949—Miscellaneous	28
October 31, 1949—Setting Case for Trial Jan. 20, 1950	30
January 20, 1950—Dismissing Case With Prejudice	31

INDEX	PAGE
Notice of Appeal	33
Notice of Motion for Preliminary Injunction..	17
Response to Motion for Preliminary Injunction	18
Restraining Order	15
Statement of Points on Which Plaintiff-Appel- lant Intends to Rely	34
Statement of Proceedings	38

ATTORNEYS OF RECORD

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United States Attorney.

E. R. THURMAN, ESQUIRE,

Assistant United States Attorney,

Federal Building,

Phoenix, Arizona,

Attorneys for Appellant.

MESSRS. EVANS, HULL, KITCHEL &
JENCKES,

807 Title and Trust Building,

Phoenix, Arizona,

Attorneys for Appellee.

In the United States District Court for the
District of Arizona

Phoenix Civil Docket
Civ-998 Phx.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

FRANK WALLACE and R. M. MAKEMSON,
dba Wallace & Wallace, a partnership,
Defendants.

FILINGS-PROCEEDINGS

Date

1947

- Apr. 14— 1 File Govt's complaint (U.S.A. \$15.00).
Apr. 14— 2 File Govt's praecipe for summons.
Apr. 14— Issue summons.
Apr. 14— 3 File Govt's Notice of Motion for Preliminary injunction for hearing Apr. 21, 1947.
Apr. 14— 4 Enter and file Temporary Restraining Order.
Apr. 19— 5 File summons returned by Marshal showing service on deft.
Apr. 19— 6 File cc Restraining Order returned by Marshal showing service on deft.
Apr. 19— 7 File subpoena showing service on J. Bayard Caruthers (see paper No. 7 in Civ.-999 Phx).

1947

- Apr. 21—— Pltff's Mo. for Preliminary Injunction on reg. for hearing. E. R. Thurman pres. for Govt. Norman Hull and Wm. Spaid pres. for defts. Hear Govt's Mo. for Preliminary injunction. Order preliminary injunction may issue herein. File Govt's exhibit No. 1.
- Apr. 21— 8 File defts' response to Motion for Preliminary Injunction.
- Apr. 21— 9 File defts' Memo. of Points and Authorities.
- May 1—10 File stipulation of counsel that defts. may have to and including May 20, 1947, to answer or otherwise appear.
- May 1—11 File subpoena returned by Marshal showing service on John Morris (See paper No. 13 in Civ-997 PHX.).
- May 1—12 File subpoena returned by Marshal showing service on Herbert Meyer Williams (See paper No. 13 in Civ-997).
- May 5—13 Enter and File Findings of Fact and Conclusions of Law upon Motion for Preliminary injunction.
- May 5—14 Enter and file Decree of Preliminary Injunction.
- May 6—— Fwd. copy of Decree to Counsel for defts.

1947

May 13—— On mo. E. R. Thurman, order allow counsel for Govt. to withdraw any exhibits admitted in evidence or marked for ident. on hearing of pltfs' mo. for preliminary injunction.

June 2—15 File defts' Answer.

1948

Apr. 19—— On for trial setting or other disposition. Thurman for Govt. Hull for deft. On mo. Thurman order pass on calendar.

1949

Feb. 14—— On for trial setting or other disposition. Thurman for Govt. Norman S. Hull for deft. and suggests dismissal. Thurman moves for setting. Order set for trial May 10, 1949, 10 a.m.

Apr. 15—16 File Pltf's Request for Admissions.

Apr. 25—17 File Defts' Response to Request for Admission.

Apr. 26—— File Pltf's Praecipe for subpoena duces tecum to Vera F. Harris, and John A. Skeen (See Paper No. 35 in Civ-999 Phx.).

Apr. 26—— Issue subpoena duces tecum.

May 6—— Order vacate order setting this case for trial May 10, 1949.

Oct. 31—— Case called pursuant to Rule 14. Thurman for Govt. Norman Hull for deft. Order set for trial Jan. 20, 1950, 10 a.m. with a jury.

1950

- Jan. 11—18 File Pltff's Praeipce for subpena duces tecum to Vera F. Harris and subpenas to John F. Taggert, Roy Maypole, Jeffry Sidebotham, Herbert Meyer Williams and J. B. Caruthers.
- Jan. 11— Issue subpena to Herbert Meyer Williams, John F. Taggert, Roy Maypole, Jeffry Sidebotham, J. B. Caruthers and subpena duces tecum to Vera F. Harris.
- Jan. 13—19 File Plaintiff's Praeipce for subpoenas to Herbert Meyer Williams and Charles K. Wilson.
- Jan. 13— Issues subpoenas to Herbert Meyer Williams and Charles K. Wilson.
- Jan. 17—20 File Marshal's Return to subpoena showing no service on Herbert Meyer Williams.
- Jan. 17—21 File Marshal's Return to Subpoena showing service on Jeffry Sidebotham.
- Jan. 17—22 File Marshal's Return to subpoena showing service on Roy A. Maypole.
- Jan. 17—23 File Marshal's Return to Subpoena showing service on John F. Taggert.
- Jan. 19—24 File Marshal's Return to Subpoena showing service on J. Bayard Caruthers.
- Jan. 19—25 File Marshal's Return to Subpena Duces Tecum showing no service on Vera F. Harris.

1950

- Jan. 19—26 File Marshal's Return to Subpena Duces Tecum showing no service on Charles K. Wilson.
- Jan. 20—— On for trial. Flynn and Thurman for Govt. Norman S. Hull and James H. Green, Jr. pres. for deft. Flynn now states that due to the inability of the Govt. to locate its principal witness who is reported to be in Mexico, the Govt. is not ready for trial and unable to make any showing as to when the witness will be available. Said counsel for Govt. now moves for dismissal without prejudice. Hull objects to dismissal of case without prejudice and moves that case be dismissed with prejudice. It is ordered that this case be and it is dismissed with prejudice.
- Jan. 24—27 Enter and file Judgment dissolving injunction and dismissing action.
- Mar. 20—28 File Plaintiff's Notice of Appeal. (U.S.A. \$5.00.)
- Mar. 20—— Mail Copy of Notice of Appeal to counsel for defts.
- Mar. 20—29 File Plaintiff's Designation of Record.
- Mar. 20—30 File Plaintiff's Statement of Points on Which Plaintiff-Appellant Intends to Rely.

1950

- Mar. 30—31 File Stipulation that one copy of record on appeal need be filed with U. S. Court of Appeals.
- Mar. 30—32 Defts' Statement of Proceedings.
- Mar. 30—33 File Defts'. Additional Designation of Record.
- Apr. 18—34 File Plaintiff's Supplemental Statement of Proceedings.
- Apr. 25—35 File Plaintiff's (Amended) Supplemental Statement of Proceedings.
- Apr. 25—— Enter Order that Defts' Statement of Proceedings filed on Mar. 30, 1950, and Pltf's Supplemental Statement of Proceedings filed Apr. 25, 1950, be approved and made a part of the record on appeal in this case.
- Apr. 25—— Prepare and forward Record on Appeal to U. S. Court of Appeals at San Francisco, Calif. by registered mail. (U.S.A. \$5.20.)
-

[Title of District Court and Cause.]

COMPLAINT

I.

This is a civil action brought by the United States of America, as plaintiff, under Sec. 26(b) of the Surplus Property Act of 1944 (50 U.S.C.A., App., Sec. 1635(b)) of which this Court has juris-

diction under Sec. 26(c) of said statute (50 U.S.C.A., App., Sec. 1635(c)).

II.

On information and belief, the defendants Frank Wallace and R. M. Makemson, at all times herein-after mentioned, were residents of Phoenix, Arizona, and are engaged as partners in the business of general contracting under the firm name and style of Wallace & Wallace, in the City of Phoenix, Maricopa County, Arizona.

III.

Between the dates of February 1, 1946, and July 1, 1946, the War Assets Administration, a Government agency, conducted sales at Port Hueneme, California, and Rivers, Arizona, pursuant to the Surplus Property Act of 1944, as amended, and regulations promulgated thereunder, of certain surplus Government property, consisting of new and used Lima 750 shovels, LeTourneau carryalls, Dodge pickup trucks and other motor vehicles and various other kinds of personal property belonging to the United States. The [2*] said surplus property was, in accordance with the aforesaid Act and regulations, available for purchase exclusively by duly certified veterans of World War II who had certified that the surplus property sought to be purchased was for their own personal use or for the maintenance of their established businesses, professions or agricultural activities.

* Page numbering appearing at foot of page of Certified Transcript of Record.

IV.

The said defendants, in connection with the sales aforesaid, for the purpose of securing or obtaining, or aiding to secure or obtain, certain of said surplus Government property, used or engaged in, or caused to be used or engaged in fraudulent tricks, schemes or devices, and entered into an agreement, combination or conspiracy for said purpose, in violation of the provisions of Sec. 26(b) of the Surplus Property Act of 1944 (50 U.S.C.A., App., Sec. 1635(b)) and other statutes of the United States, as hereinafter more fully appears.

V.

Defendants, in or about the month of February, 1946, and prior to the holding of the said sales aforesaid, agreed and conspired among themselves and with a certain veteran of World War II, to acquire certain of said surplus property at said sales by arranging to have said veteran defraud the United States concerning its governmental rights and functions of administering the sale of surplus property under and by virtue of the Surplus Property Act of 1944, as amended, and the rules and regulations promulgated thereunder, and to defraud the United States of and concerning its right to have those who deal with the Government do so honestly; and to defraud the United States of and concerning its governmental right to determine, with a full knowledge of the true facts, whether to sell or not to sell certain surplus property in accordance with the objectives of the said Surplus

Property Act of 1944; and to defraud the United States of and concerning its governmental functions and right to impose conditions and terms of when and to whom it would make sales of such said surplus property; and then and there, in accordance with the said agreement, plan and scheme, said defendants had the said veteran of World War II, for monetary considerations in the nature of commissions, obtain, by means of said veteran's priority certificates, for the sole use, benefit and ownership of the said defendants, with funds furnished by the said defendants, certain war surplus property, to wit: Lima 750 shovels, LeTourneau carryalls, Dodge pickup trucks and other motor vehicles and various other kinds of personal property belonging to the United States, and the said defendants then and there well knowing that said surplus property was available only to veterans of World War II and not for resale, and that all of such matters were under the jurisdiction of the War Assets Administration.

VI.

Pursuant to the agreement, combination and conspiracy aforesaid, said veteran of World War II, at the direction of defendants and with funds furnished by the said defendants to the said veteran, was successful, under and by virtue of his said priority certificates, in acquiring, on the dates and for the purchase prices hereinafter set forth, the following surplus property for and on behalf of the said defendants, to wit:

Date	Surplus Property	Serial No.	Purchase Price
2-27-46	Lima 750 Shovel	1N9345	\$17,315.00
3-26-46	LeTourneau Carryall	523561	3,363.75
4- 9-46	Dodge Cargo Truck, 1½ ton, Motor #T74-9898		371.46
	Dodge Cargo Truck, 1½ ton.....	8290536	368.16
	Dodge Pickup Truck.....	8093319	395.14
6- 3-46	International cargo truck, 2½ ton....	25162	2,060.00
6- 8-46	International dump truck, 2½ ton....	39840	2,917.97
	International dump truck, 2½ ton....	39848	2,917.97
	International dump truck, 2½ ton....	39976	2,917.97
Total.....			\$32,627.42

VII.

Upon obtaining all of the above-described property and title thereto from the War Assets Administration, said veteran, pursuant to the conspiracy aforesaid, immediately delivered the same, and all thereof, to the defendants, and said defendants thereupon assumed ownership thereof and commenced using the said property, and all thereof, in their said business as general contractors.

VIII.

Upon information and belief, plaintiff alleges that all of said surplus property is now in the exclusive possession, use and control of said defendants.

IX.

By reason of the premises and pursuant to the provisions of Sec. 26 of the Surplus Property Act of 1944 (50 U.S.C.A., App., Sec. 1635), defendants Frank Wallace and R. M. Makemson became,

and are liable, at the election of the United States, to pay to the United States the sum of Two Thousand Dollars (\$2,000.00) for each act committed by them in violation of said statute and double the amount of any damage which the United States may have sustained by reason thereof, or, to pay to the United States as liquidated damages a sum equal to twice the consideration agreed to be given to the War Assets Administration for the property obtained, or, to restore to the United States the property thus secured and obtained, the United States retaining as liquidated damages the entire consideration paid the War Assets Administration for said property.

X.

The accomplishment of the purpose and objectives of the Surplus Property Act of 1944, as amended, and of the Regulations of the War Assets Administration issued thereunder, and of the system of disposition of surplus Government property established thereby, depends upon the effective and orderly administration and enforcement of said statute and Regulations and upon strict compliance with all of the provisions thereof to the end that all groups having priority rights with respect to the acquisition of surplus Government property shall have a full and fair opportunity to exercise such rights in the order of their priority. Unless restrained and enjoined by injunction of this Court, the defendants will dispose of said surplus property thus unlawfully obtained to third parties not con-

nected with the conspiracy, all to the immediate and irreparable injury, loss and damage of the plaintiff and the people of the United States.

Wherefore, the United States, as plaintiff, prays that:

1. A temporary restraining order issue, restraining until the determination of plaintiff's motion for a preliminary injunction herein, the defendants, and each of them, their servants, agents, employees, attorneys, representatives, and all others acting in concert or participation with them, or at their request or direction, or any of them, from directly or indirectly moving, transferring, assigning, selling, encumbering or in any way whatsoever disposing of or affecting the situs, form, possession or ownership of any of the 9 pieces of surplus property described in Paragraph VI hereof, or any part of said property.

2. A preliminary injunction issue against the said defendants enjoining them, and each of them, their servants, agents, employees, attorneys, representatives, and all others acting in concert or participation with them, or at their request or direction, or any of them, from directly or indirectly moving, transferring, assigning, selling, encumbering or in any way whatsoever disposing of or affecting the suits, form, possession or ownership of any of the 9 pieces of surplus property described in Paragraph VI hereof, or any part of said property.

3. Judgment be entered in its favor against the defendants for restoration to the United States of America, at defendants' expense, of the 9 pieces of surplus property described in Paragraph VI hereof in the same condition as when acquired by defendants, the United States to retain as liquidated damages the entire consideration given the War Assets Administration for said property.

4. In the alternative, but only in the event the relief prayed for in the preceding paragraph is impossible of attainment, judgment be entered in its favor against defendants for the sum of \$32,-627.42, together with interest and the costs of suit, which with the similar sum already received by War Assets Administration for the aforesaid property, will result in plaintiff receiving as liquidated damages and defendants paying, upon satisfaction of said judgment, a sum equal to twice the consideration agreed to be given to the War Assets Administration for the said property obtained.

5. This Court grant such other, further and different relief as to the Court may seem just and proper.

FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant U. S. Attorney.
Attorneys for Plaintiff.

United States of America,
District of Arizona—ss.

J. Bayard Caruthers, being first duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge except as to matters stated therein on information and belief, and as to those matters, he believes the same to be true.

J. BAYARD CARUTHERS.

Subscribed and sworn to before me this 10th day of April, 1947.

GERTRUDE I. BITTING,
Deputy Clerk, U. S. District Court, District of
Arizona.

[Endorsed]: Filed April 14, 1947.

[Title of District Court and Cause.]

RESTRAINING ORDER

Upon the verified Complaint filed herein, and it appearing to the satisfaction of the Court that the defendants named therein, acting in aid and concert, will dispose of the 9 pieces of surplus property described in Paragraph VI of the Complaint to third parties and thus render impossible their restoration to the United States, unless restrained

by order of the Court, and good cause appearing therefor,

It Is Hereby Ordered:

1. That the said defendants, and each of them, their servants, agents, employees, attorneys, and all others acting in concert or participation with them, at their request or direction, or any of them, are hereby restrained and enjoined from directly or indirectly moving, transferring, assigning, selling, encumbering or in any way whatsoever disposing of or affecting the situs, form, possession or ownership of any of the 9 pieces of surplus property described in Paragraph VI of the Complaint.

2. This Order shall expire on the 23rd day of April, 1947, at the hour of 10 o'clock A.M.

Done In Open Court this 14th day of April, 1947, at the hour of 1:40 P.M.

/s/ DAVE W. LING,
Judge.

[Endorsed]: Filed April 14, 1947. [3]

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Above-Named Defendants:

You, and each of you, will please take notice that on the 21st day of April, 1947, at the hour of ten o'clock A.M., or as soon thereafter as counsel may be heard, in the Courtroom of the Hon. Dave W. Ling, Judge of the above-entitled court, in the United States Courthouse Building, Phoenix, Arizona, plaintiff will present its motion for a preliminary injunction enjoining the defendants, and each of them, until further order of the Court, from disposing of certain surplus property obtained as the result of sales conducted by the War Assets Administration between February, 1, 1946, and July 1, 1946, as will more fully appear from the Complaint on file herein.

Said motion will be based upon the verified Complaint on file herein, upon all of the files and records in the case and upon such further affidavits, exhibits, evidence and oral testimony as shall be adduced at said time and place.

FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant U. S. Attorney.
Attorneys for Plaintiff.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES

In support of its Motion above-mentioned, plaintiff will rely upon the following points and authorities:

1. The United States District Court for the District of Arizona has full power and jurisdiction to hear, try and determine the instant suit and to grant the relief prayed for herein.

Surplus Property Act of 1944, Sec. 26(b) and 26(c) (50 U.S.C.A., App. §1635(b) and §1635(c)).

Judicial Code, Sec. 24 (1); (28 U.S.C.A. 41(1)).

FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant U. S. Attorney.
Attorneys for Plaintiff.

[Endorsed]: Filed April 14, 1947.

[Title of District Court and Cause.]

RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

Defendants, appearing for the sole purpose of resisting plaintiff's application for a preliminary injunction as prayed for in Paragraph II of the

prayer to the complaint herein, and without otherwise appearing or answering the complaint, respond, as follows:

1. Allege that the complaint fails to state a claim upon which injunctive relief can be granted against defendants, and shows upon its face that plaintiff has an adequate remedy at law.

2. Admit exclusive possession, use and control of the equipment listed in Paragraph VI, save and except Dodge Cargo Truck, Serial No. 8290536, and allege that such truck was disposed of long prior to the institution of this action. Allege that such equipment is being used on an Arizona State Highway project in Maricopa County, approximately 25 miles north of Phoenix, and that such use, and similar use elsewhere in Arizona, is required to fulfill existing highway construction contracts binding upon defendants.

3. Deny each and all of the allegations contained in lines 6 to 10, page 5, Paragraph X, and allege that defendants do not intend to, nor will they dispose of such equipment, or of [5] any piece or article thereof, pending disposition of this action or the sooner Order of this Court.

4. Allege that the granting of injunctive relief, as prayed for in the Complaint, would impose undue hardship upon defendants and would result in forcing defendants to breach existing contracts and to cease business, all without corresponding benefit or advantage to plaintiff.

Wherefore, defendants pray that the restraining order of April 14, 1947, be dissolved, and that plaintiff's application for a preliminary injunction be denied.

EVANS, HULL, KITCHEL,
RILEY & JENCKES,

By /s/ NORMAN S. HULL,

By /s/ WM. SPAID,

Attorneys for Defendants.

State of Arizona,
County of Maricopa—ss.

R. M. Makemson, being duly sworn, deposes and says that during all times mentioned in plaintiff's complaint he was a partner of Wallace & Wallace, the partnership composed of the defendants herein; that he has read the foregoing Response to plaintiff's Notice of Motion and knows the contents thereof; that the allegations therein contained are true in substance and in fact.

R. M. MAKEMSON.

Subscribed and sworn to before me this 21st day of April, 1947.

/s/ WM. H. LOVELESS,

Clerk U. S. District Court.

[Endorsed]: Filed April 21, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSION OF
LAW UPON MOTION FOR PRELIMI-
NARY INJUNCTION

Findings of Fact

This matter came on regularly for hearing on Monday, the 21st day of April, 1947, before the Court without a jury, Frank E. Flynn, United States Attorney, and E. R. Thurman, Assistant U. S. Attorney, appearing as attorneys for plaintiff, and Evans, Hull, Kitchel, Ryley & Jenckes appearing by Norman S. Hull and William Spaid as attorneys for defendants, and from the evidence introduced the Court finds the facts as follows, to wit:

I.

That at all times mentioned in plaintiff's complaint the defendants Frank Wallace and R. M. Makemson were a partnership doing business at Phoenix, Arizona, as Wallace & Wallace, and engaged in the general contracting business.

II.

That the War Assets Administration is an agency of the Government of the United States of America.

III.

That the War Assets Administration, pursuant to the Surplus Property Act of 1944, as amended, and the regulations promulgated thereunder, be-

tween February 1, 1946, and July 1, 1946, conducted [6] sales of certain surplus government property which was available for purchase exclusively by duly certified veterans of World War II who had certified that the surplus property sought to be purchased was for their own personal use or for the maintenance of their established businesses, professions or agricultural activities.

IV.

That Herbert M. Williams was a veteran of World War II, and as such was duly certified to purchase war surplus property under and by virtue of said Surplus Property Act of 1944.

V.

That the said defendants, in connection with the sales aforesaid, for the purpose of securing or obtaining all the surplus property mentioned in Paragraph VI of plaintiff's complaint, engaged in fraudulent tricks, schemes and devices and entered into a conspiracy with the said veteran for said purpose, in violation of the provisions of Title 50 U.S.C.A., App., Sec. 1635(b).

VI.

That pursuant to said conspiracy defendants were successful in acquiring and assumed ownership of all the surplus property set forth and described in Paragraph VI of plaintiff's complaint.

VII.

That all of said surplus property is now in the exclusive possession, use and control of said defendants.

VIII.

That the defendants will transfer or otherwise dispose of said surplus property described in the complaint to third parties, thus causing irreparable injury to plaintiff by depriving it of a remedy elected under Section 26(b) of the Surplus Property Act of 1944.

Conclusion of Law

As a conclusion of law from the foregoing facts, the Court finds that the plaintiff's motion for a temporary injunction, as prayed for in plaintiff's complaint, should be granted.

Dated at Phoenix, Arizona, this 5th day of May, 1947.

/s/ DAVE W. LING,
Judge.

Receipt of copy acknowledged.

Lodged April 25, 1947.

[Endorsed]: Filed May 5, 1947.

[Title of District Court and Cause.]

DECREE OF PRELIMINARY
INJUNCTION

The above-entitled cause and the application of plaintiff for a preliminary injunction having come on regularly for hearing at 10 o'clock A.M., April 21, 1947, before the Honorable Dave W. Ling, Judge of the above-entitled court, upon the verified Complaint and Notice of Motion for Preliminary Injunction, the defendants Frank Wallace and R. M. Makemson having been duly served with said Complaint and Notice of Motion, and the said defendants appearing by and through their attorneys, Evans, Hull, Kitchel, Ryley & Jenckes, by Norman S. Hull and William Spaid, and plaintiff, United States of America, appearing by Frank E. Flynn, United States Attorney, and E. R. Thurman, Assistant U. S. Attorney, and the parties having announced that they were ready upon the hearing of the Motion for Preliminary Injunction, the Court proceeded in the premises, and oral and documentary evidence having been introduced on behalf of the plaintiff and no evidence having been introduced on behalf of the defendants, and the evidence being closed, the matter was submitted to the Court for its decision, and after due deliberation and consideration the Court finds the issues in favor of the plaintiff and against the defendants;

And it appearing to the Court that plaintiff is

entitled to the relief sought and that the Complaint herein seeks to enforce [7] the liability and obtain one of the remedies provided by Section 26(b) of the Surplus Property Act of 1944;

An it further appearing to the satisfaction of the Court that the defendants Frank Wallace and R. M. Makemson, acting in aid and concert, will transfer or otherwise dispose of the surplus property described in the Complaint to third parties, thus causing irreparable injury to plaintiff by depriving it of a remedy elected under Section 26(b) of the Surplus Property Act of 1944, unless restrained by order of this Court pending trial and final determination of the above-entitled action;

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed:

That pending trial and final determination of the above-entitled action and until further order of the Court, the said defendants, Frank Wallace and R. M. Makemson, and each of them, their servants, agents, employees, attorneys, and all others acting in concert or participation with them, at their request or direction, or any of them, are hereby restrained and enjoined from directly or indirectly transferring, assigning, selling, encumbering or in any way whatsoever disposing of or affecting the form, possession or ownership of any of the 9 pieces of surplus property described in Paragraph VI of the Complaint.

Dated at Phoenix, Arizona, this 5th day of May, 1947, at 3:20 o'clock P.M.

DAVE W. LING,

United States District Judge.

Approved as to Form Pursuant to Rule 7.

FRANK E. FLYNN,

United States Attorney.

By /s/ E. R. THURMAN,

Assistant U. S. Attorney,

Attorneys for Plaintiff.

EVANS, HULL, KITCHEL,

RYLEY & JENCKES,

By
Attorneys for Defendants.

Lodged April 25, 1947.

[Endorsed]: Filed May 5, 1947.

[Title of District Court and Cause.]

ANSWER

Defendants answer the Complaint, as follows:

I.

Admit the allegations of paragraphs I and II, and that War Assets Administration sold and the veteran purchased the surplus property mentioned in paragraphs III and VI, and that the same, save and except Dodge Cargo Truck, Serial No. 8290536

which was disposed of prior to suit, is in defendants' possession, use and control, as alleged in paragraph VIII.

II.

Denies each and every allegation contained in paragraphs IV, V, VII, IX and X, and the allegations of paragraph III, concerning the purpose for which such property was available for purchase and the allegations of paragraph VI, concerning the manner in which the veteran purchased the same, together with all allegations of the Complaint not herein expressly admitted.

III.

Allege that defendants rented the Lima 750 shovel and purchased the other property from the veteran for use, and has been and now is using the same in performing road construction projects for the State of Arizona and for the United States. [8]

Wherefore, defendants pray that plaintiff take nothing by its action herein and that defendants have such other and further relief as may be warranted in the premises.

EVANS, HULL, KITCHEL,
RILEY & JENCKES,

By /s/ NORMAN S. HULL,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed June 2, 1947.

In the United States District Court
for the District of Arizona

October, 1948, Term

MINUTE ENTRY OF WEDNESDAY,
FEBRUARY 2, 1949
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

Misc.

It Is Ordered that the general calendar of civil cases in the Phoenix Division of this Court be called Monday, February 14, 1949, at 10:00 o'clock a.m., for trial setting or other disposition pursuant to Rule 14 of this Court. [9]

RULES OF PRACTICE

Of the United States District Court
for the District of Arizona
Effective September 16, 1938

RULE 14

Trial Calendar and Setting of Causes; Dismissal
for Want of Prosecution

At such time or times as the court shall designate the general calendar of all pending criminal cases will be called and all such causes will then be set for trial on some particular day, continued, or otherwise disposed of: Provided, however, That criminal cases, when at issue may be set at any

time for trial at such time and in such order as the arraignments and pleas of defendants may render most expedient for the ready dispatch of the business before the court.

At such time or times as the court may designate the general trial calendar of all civil cases at issue and ready for trial will be called, and all such causes will then be set for trial on some particular day, continued or otherwise disposed of. At least 5 days' notice of the call of such calendar shall be given by the clerk to all counsel having cases thereon. Civil cases in which issue is joined subsequent to the call of the general trial calendar may, on not less than 5 days' notice in writing, be placed upon the motion calendar to be set for trial.

Causes not answered by either party on the call of the general trial calendar may be continued to the next call of the calendar. Cases in which issue is joined shall be set for trial at the general call of the calendar, or dismissed for want of prosecution, except for good cause shown, the court may continue the same until the next call of the calendar. Cases which have been pending for more than 1 year without any proceedings having been taken therein during such year may be dismissed as of course, for want of prosecution by the court on its own motion at a general call of the calendar.

[Endorsed]: Filed Sept. 16, 1938.

EDWARD W. SCRUGGS,

Clerk, United States District Court for the District
of Arizona. [10]

In the United States District Court
for the District of Arizona

October, 1949, Term

MINUTE ENTRY OF MONDAY,
OCTOBER 31, 1949

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

This case is now called for trial setting or other disposition pursuant to Rule 14 of this court. E. R. Thurman, Esquire, Assistant United States Attorney, appears for the Government. Norman Hull, Esquire, is present for the defendant.

It Is Ordered that this case be and it is set for trial January 20, 1950, at 10:00 o'clock a.m. with a jury. [11]

In the United States District Court
for the District of Arizona

October, 1949, Term

MINUTE ENTRY OF FRIDAY,
JANUARY 20, 1950

(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for trial this day. Frank E. Flynn, Esquire, United States Attorney, and E. R. Thurman, Esquire, Assistant United States Attorney, are present for the Government. Norman S. Hull, Esquire, and James H. Green, Jr., Esquire, are present for the defendant, and announce ready for trial.

Frank E. Flynn, Esquire, now states that due to the inability of the Government to locate its principal witness who is reported to be in Mexico, the Government is not ready for trial and unable to make any showing as to when the witness will be available. Said counsel for the Government now moves for dismissal without prejudice.

Norman S. Hull, Esquire, objects to dismissal of case without prejudice and moves that case be dismissed with prejudice.

It Is Ordered that this case be and it is dismissed with prejudice.

(Docketed Jan. 20, 1950.) [12]

In the District Court of the United States
for the District of Arizona
No. Civ. 998 Phx.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK WALLACE and R. M. MAKEMSON, dba
Wallace & Wallace, a partnership,
Defendants.

JUDGMENT

The above-entitled action having come on regularly for trial at 10:00 a'clock a.m., January 20, 1950, and defendants having announced ready for trial and plaintiff having announced not ready for trial, and the court having heard the oral motion of defendants to dismiss said action with prejudice and to dissolve the decree of preliminary injunction issued May 5, 1947, and the court having heard the arguments of counsel upon the motion, does hereby find that said motion should be granted and said action dismissed.

Wherefore, it is ordered, adjudged and decreed that the preliminary injunction issued May 5, 1947, be dissolved and quashed and that the said action be, and the same hereby is, dismissed, with prejudice to any subsequent suit upon said claim.

Dated January 24, 1950.

/s/ DAVE W. LING,
District Judge.

[Endorsed]: Filed and Docketed January 24,
1950. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 24, 1950.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant United States
Attorney.

Of Counsel:

/s/ JOSEPH M. FRIEDMAN,
Special Assistant to the
Attorney General.

/s/ J. GREGORY BRUCE,

/s/ JOHN G. ROBERTS,
Attorneys, Department of
Justice, Washington, D. C.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1950. [14]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
PLAINTIFF-APPELLANT INTENDS TO
RELY

The points on which the United States intends to rely, on the appeal of this cause, are:

(1) It was an abuse of discretion for the trial court to have denied plaintiff's motion to dismiss without prejudice, and to grant defendants' motion for dismissal with prejudice.

(2) It was error for the trial court to have dismissed the action with prejudice without having offered plaintiff-appellant an alternative method of trial.

To sustain its contentions as to the above two points, the United States, as plaintiff-appellant, relies upon those portions of the Record which it has designated for inclusion in the Record on Appeal, and of such designated record, the United States particularly relies upon the following:

(1) Complaint. [15]

(2) Findings of Fact and Conclusions of Law upon Motion for Preliminary Injunction.

(3) Order dismissing the case with prejudice.

(4) Final Judgment, dissolving the injunction and dismissing the action.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant United States
Attorney.

Of Counsel:

/s/ JOSEPH M. FRIEDMAN,
Special Assistant to the
Attorney General.

/s/ J. GREGORY BRUCE,

/s/ JOHN G. ROBERTS,
Attorneys, Department of
Justice, Washington, D. C.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1950.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The United States of America, as plaintiff-appellant herein, hereby designates the following portions of the record, proceedings, and evidence in the above-entitled case to be contained in the Record on Appeal:

- (1) All docket entries.
- (2) Complaint.
- (3) Temporary Restraining Order.
- (4) Notice of Motion for Preliminary Injunction filed by plaintiff.
- (5) Response to Motion for Preliminary Injunction filed by defendants.
- (6) Findings of Fact and Conclusions of Law upon Motion for Preliminary Injunction entered and filed on May 5, 1947.
- (7) Decree of Preliminary Injunction entered and filed on May 5, 1947.
- (8) Defendants' Answer.
- (9) Order setting the case for jury trial at 10:00 a.m. on January 20, 1950. [16]
- (10) Order dismissing case with prejudice entered on January 20, 1950.
- (11) Judgment dissolving the injunction and dismissing the action with prejudice, entered and filed on January 24, 1950.
- (12) Notice of Appeal filed by plaintiff on March 20, 1950.
- (13) All motions for Enlargement of Time, for any purpose, which may be filed by either of the parties hereto prior to the filing and docketing of the Record on Appeal herein, and Orders entered thereon.

(14) Statement of Points on which the United States of America, as plaintiff-appellant, intends to rely.

(15) This Designation of Record.

/s/ H. G. MORISON,
Assistant Attorney General.

/s/ FRANK E. FLYNN,
United States Attorney.

/s/ E. R. THURMAN,
Assistant United States
Attorney.

Of Counsel:

/s/ JOSEPH M. FRIEDMAN,
Special Assistant to the
Attorney General.

/s/ J. GREGORY BRUCE,

/s/ JOHN G. ROBERTS,
Attorneys, Department of
Justice, Washington, D. C.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1950.

[Title of District Court and Cause.]

STATEMENT OF PROCEEDINGS

The above-entitled action having come on regularly for trial at 10:00 o'clock a.m., January 20, 1950, Mr. Frank E. Flynn and Mr. E. R. Thurman appeared for the plaintiff and Mr. Norman S. Hull and Mr. James H. Green, Jr., appeared for the defendants.

No stenographic report was made of the proceedings which followed.

Upon call of the above-entitled case for trial by the clerk of the court, Mr. Frank Flynn announced for the plaintiff that it was not ready for trial because it did not have present its chief witness. Whereupon, the court asked Mr. Flynn when such witness would be present. In reply, Mr. Flynn stated that the witness was out of the jurisdiction and it was not known when the witness would be available. Mr. Flynn, for the plaintiff, then moved that the action be dismissed without prejudice.

Mr. Hull, attorney for the defendants, opposed the motion and argued that this case had been pending for almost three years and had not yet been brought to trial and that the [17] defendants had suffered damage and would suffer further damage by delay because of the decree of preliminary injunction entered and filed on May 5, 1947. Whereupon Mr. Hull, for the defendants, moved the court to dismiss the action with prejudice for want of prosecution.

The court then ruled that defendants' motion to dismiss with prejudice for failure to prosecute the action was granted and ordered the clerk to make such entry accordingly.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ NORMAN S. HULL,
Attorneys for Defendants.

The foregoing Statement of Proceedings, in conjunction with the Supplemental Statement of Proceedings filed April 25, 1950, is hereby approved.

/s/ DAVE W. LING,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1950.

[Title of District Court and Cause.]

ADDITIONAL DESIGNATION OF RECORD

Frank Wallace and R. M. Makemson, as defendants-appellees, hereby designate the following portions of the record, proceedings and evidence in the above-entitled case to be contained in the Record on appeal:

(1) Miscellaneous Minute entry on February 2, 1949;

(2) Local Court Rule No. 14;

(3) Statement of Proceedings upon Defendants' Motion to Dismiss with prejudice, January 20, 1950.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ NORMAN S. HULL,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1950. [18]

[Title of District Court and Cause.]

SUPPLEMENTAL STATEMENT OF
PROCEEDINGS

(Amended)

In addition to the Statement of Proceedings which occurred on January 20, 1950, submitted by attorneys for the defendants, we believe that the record should show that when the United States Attorney stated to the Court that he did not have his chief witness present, and when asked by the Court when his witness would be present, the United States Attorney replied that the witness was in Mexico and that the government was unable to make any definite showing as to when he would be available, but that he has made trips to the United States since he went to Mexico.

Further, that when Mr. Hull, the attorney for the defendants, stated that the case had been pending for almost three years, the United States Attorney stated that a considerable portion of that time was accounted for by the fact that the defendants had made an offer in compromise and that no action was taken while this offer was being considered.

While there was nothing in the proceedings on January 20 indicating the time when the offer was made or when it was rejected by the government, we have no objection to the record showing that

the offer was made on May 6, 1949, and rejected on September 7, 1949.

/s/ FRANK E. FLYNN,

United States Attorney for
the District of Arizona.

The foregoing Supplemental Statement of Proceedings, in conjunction with the Statement of Proceedings filed March 30, 1950, is hereby approved.

/s/ DAVE W. LING,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 25, 1950.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Frank Wallace and R. M. Makemson, dba Wallace and Wallace, a partnership, Defendants, numbered Civ-998 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the civil docket entries, Local Rule 14, and minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the civil docket entries, Local Rule 14 and minute entries, constitute the entire record on appeal in said case as designated in the Designations filed therein and made a part of the record attached hereto, and the same are as follows, to-wit:

1. Civil Docket Entries.
2. Complaint filed April 14, 1947.
3. Restraining Order filed April 14, 1947.
4. Notice of Motion for Preliminary Injunction filed April 14, 1947.
5. Defendants' Response to Motion for Preliminary Injunction filed April 21, 1947.
6. Findings of Fact and Conclusion of Law Upon Motion for Preliminary Injunction, filed May 5, 1947.
7. Decree of Preliminary Injunction, filed May 5, 1947.
8. Answer, filed June 2, 1947.
9. Miscellaneous Minute Entry of February 2, 1949. [20]

10. Local Court Rule No. 14.
11. Minute Entry of October 31, 1949, setting case for trial January 20, 1950.
12. Minute Entry of January 20, 1950, dismissing case with prejudice.
13. Judgment filed January 24, 1950.
14. Notice of Appeal, filed March 20, 1950.
15. Statement of Points on Which Plaintiff-Appellant Intends to Rely, filed March 20, 1950.
16. Appellant's Designation of Record, filed March 20, 1950.
17. Appellees' Statement of Proceedings, filed March 30, 1950.
18. Appellees' Additional Designation of Record, filed March 30, 1950.
19. Appellant's Supplemental Statement of Proceedings, filed April 25, 1950.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of \$5.20, and that a memorandum of said sum has been entered in said cause by me for services rendered on behalf of the United States.

Witness my hand and the seal of said Court this 25th day of April, 1950.

[Seal] /s/ WM. A. LOVELESS,
Clerk.

[Endorsed]: No. 12529. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frank Wallace and R. M. Makemson, doing business as Wallace and Wallace, a partnership, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed April 27, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

**BRIEF FOR APPELLANT, UNITED STATES OF
AMERICA**

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12529

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK WALLACE AND R. M. MAKEMSON, DOING BUSINESS
AS WALLACE AND WALLACE, A PARTNERSHIP, APPEL-
LEES

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA, PHOENIX DIVI-
SION

H. G. MORISON,
Assistant Attorney General.

FRANK E. FLYNN,
United States Attorney.

E. R. THURMAN,
Assistant United States Attorney.

Of Counsel:

JOSEPH M. FRIEDMAN,
Special Assistant to the Attorney General.

J. GREGORY BRUCE,

JOHN G. ROBERTS,

*Attorneys, Department of Justice,
Washington, D. C.*

FILED

SEP 9 1950

FILED

PAUL P. O'BRIEN,
CLERK

INDEX

	Page
Statement of Pleadings and Facts.....	1
Ruling of the Court Below.....	5
Statutes and Court Rules Involved.....	5
Statement of Points	7

Argument:

I. It was an abuse of discretion for the court below to have denied plaintiff's motion to dismiss without prejudice, and then to have granted defendants' motion to dismiss with prejudice.....	8
II. It was error for the court below to have dismissed the action with prejudice without having afforded plaintiff the opportunity to protect its cause of action.....	12
Conclusion	14

CITATIONS

Cases:

<i>Bolton v. General Motors Corporation</i> , 7 Cir., (1950), 180 F. (2d) 379	10, 11
<i>Ex Parte Skinner & Eddy Corporation</i> , (1924), 265 U. S. 86 ..	8
<i>Field v. American-West African Line, Inc.</i> , 2 Cir., (1946), 154 F. (2d) 652.....	12
<i>Home Owners' Loan Corporation v. Huffman</i> , 8 Cir., (1943), 134 F. (2d) 314	10
<i>Hydraulic Press Manufacturing Co. v. Williams, White & Co.</i> , 7 Cir., (1947), 165 F. (2d) 489.....	10
<i>International Shoe Co. v. Cool</i> , 8 Cir., (1946), 154 F. (2d) 778; cert. den. 329 U. S. 726.....	12
<i>Jones v. Securities & Exchange Commission</i> , (1936), 298 U. S. 1	8, 9
<i>Lawson v. Moore et al.</i> , D. Ct. for W. D. of Va., (1939), 29 F. Supp. 175	10
<i>Peardon v. Chapman et al.</i> , 3 Cir., (1948), 169 F. (2d) 909	13
<i>Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co.</i> , Cir. Ct. for D. of Mass., (1902), 121 F. 1015.....	8
<i>Union Tool Company v. Wilson</i> , (1922), 259 U. S. 107.....	12
<i>United Motors Service, Inc. v. Tropic-Aire, Inc.</i> , 8 Cir., (1932), 57 F. (2d) 479.....	8
<i>Wilson v. Jolly</i> , D. Ct. for N. D. of Tex., (1948), 7 F. R. D. 649	10

Statutes and Rules:

Federal Property and Administrative Service Act of 1949; Public Law 152, 81st Congress, 1st Session.....	1
Federal Rules of Civil Procedure, Rule 41.....	6, 9, 11
Surplus Property Act of 1944, Section 26(b), (c) (50 U.S.C., App., Sec. 1635 (b), (c)).....	1, 4, 5
United States Code, Title 28, Section 1291.....	4

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12529

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK WALLACE AND R. M. MAKEMSON, D/B/A WALLACE
& WALLACE, A PARTNERSHIP, APPELLEE

*APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA, PHOENIX DIVI-
SION*

BRIEF FOR APPELLANT, UNITED STATES OF AMERICA

STATEMENT OF PLEADINGS AND FACTS

This is a civil action brought by the United States of America, as plaintiff, under the provisions of Section 26(b) of the Surplus Property Act of 1944 (50 U. S. C., App., Sec. 1635(b)),¹ to recover damages as provided by Section 26(b) of said statute, on account of certain acts alleged in the Complaint to have been committed by the defendants in violation of Section 26(b) of said statute. These alleged violations of Section 26(b) concerned the purchase of certain surplus Government

¹ Repealed and reenacted as Section 209(b) of the Federal Property and Administrative Services Act of 1949; Public 152, 81st Cong., 1st Sess.

properties from the War Assets Administration at Port Hueneme, California and at Rivers, Arizona between February 1, 1946 and July 1, 1946 (T. R. 8).² The complaint (T. R. 7-15) which was filed on April 14, 1947, prayed for: (1) the issuance of a temporary restraining order to prevent disposition, or encumbrance, of any of the nine items of surplus property described in the complaint (T. R. 13); (2) the issuance of a similar preliminary injunction (T. R. 13); (3) judgment restoring the described surplus properties to the United States, which would be permitted to retain, as liquidated damages, the entire consideration which defendants had given for such properties (T. R. 14); or, in the alternative, (4) judgment for \$32,627.42 together with interests and costs (T. R. 14) and such other, further, and different relief as the court may deem just and proper (T. R. 14).

The complaint principally alleged that the defendants conspired to (T. R. 9), and actually did have a certain veteran of World War II acquire surplus properties (T. R. 10 and 11) which had been offered for sale exclusively to veterans of World War II for their own use (T. R. 8), and that, in accordance with the conspiracy, the veteran concerned delivered to defendants each of the following items as soon as they had been delivered to him (T. R. 11):

Date	Surplus Property	Serial No.	Purchase Price
2/27/26	Lima 750 Shovel	IN 9345	\$17,315.00
3/26/46	LeTourneau Carryall	523561	3,363.75
4/9/46	Dodge Cargo Truck, 1½ tons (Motor #T74-9898)		371.46
4/9/46	Dodge Cargo Truck, 1½ tons	8290536	368.16
4/9/46	Dodge Pick-up Truck	8093319	395.14
6/3/46	International Cargo Truck, 2½ tons	25162	2,060.00
6/8/46	International Dump Truck, 2½ tons	39840	2,917.97
6/8/46	International Dump Truck, 2½ tons	39848	2,917.97
6/8/46	International Dump Truck, 2½ tons	39976	2,917.97

² When used in this brief, "T.R." refers to the printed Transcript of Record.

The defendants filed their response to the Government's motion for a preliminary injunction (T. R. 18-20) ; and, at the hearing on this motion on April 21, 1947, the Government introduced both oral and documentary evidence in support of its motion, but defendants introduced no evidence in behalf of their opposition. Accordingly, the court below found the facts to be substantially as alleged in the complaint (T. R. 21-23), and issued its preliminary injunction (T. R. 24-26).

A stipulation was filed on May 1, 1947, providing that defendants should have until May 20, 1947 in which to file their Answer (T. R. 3). On June 2, 1947 defendants filed their Answer (T. R. 26-7).

In their Answer, defendants admit that the War Assets Administration sold and the veteran purchased all of the surplus property described in the Complaint ; and that, except Dodge Cargo Truck (No. 8290536), all these properties were in defendants' possession, use, and control (T. R. 26 and 27). The Answer denied all allegations concerning the conspiracy to acquire, and the actual acquisition of the surplus properties, the purpose for which the sales had been conducted, the statutory liabilities and the relief sought (T. R. 27). The Answer, then, affirmatively alleges that defendants rented the Lima Shovel and purchased the other surplus properties from the veteran for use in road construction work for the State of Arizona and for the United States (T. R. 27).

The case was called for the setting of a trial date on April 19, 1948 ; but on motion of the Government, the case was ordered passed on the calendar (T. R. 4). The case was again called for the setting of a trial date on February 14, 1949, at which time the Government moved for the setting of a trial date, and the court below ordered the trial set for May 10, 1949 (T. R. 4). On May 6, 1949 the order setting the case for trial on May

10, 1949 was vacated (T. R. 4) in order to permit the Government to consider an offer in compromise which had been made by defendants (T. R. 41 and 42). On October 31, 1949, the offer in compromise having been rejected, the case was set for jury trial on January 20, 1950 (T. R. 4).

On January 11, and 13, 1950 the Government filed praecipes for subpoenas to Herbert Meyer Williams, among others (T. R. 5); and the Marshal filed his returns on January 17, 1950 showing no service on Herbert Meyer Williams (T. R. 5). The record of Filings and Proceedings fails to indicate that any praecipe for subpoena was ever filed on behalf of defendants (T. R. 2-7).

The case was called for trial on January 20, 1950, and defendants announced ready for trial. The Government then stated that, due to inability to locate its principal witness (Herbert Meyer Williams, the veteran mentioned in the Complaint), the Government was not ready for trial and was unable to make any showing as to when the witness would be available. The Government then moved for dismissal without prejudice. Defendants objected to this motion, and moved for dismissal with prejudice (T. R. 38-9; and 41-2). The court below then ordered the case dismissed with prejudice (T. R. 31). On January 24, 1950 Judgment dissolving the injunction and dismissing the action with prejudice was entered and filed (T. R. 32). Notice of Appeal was filed by the Government on March 20, 1950 (T. R. 33).

The court below had jurisdiction of the subject matter of the proceedings under Section 26(c) of the Surplus Property Act of 1944 (50 U. S. C., App., Sec. 1635 (c)), as alleged in paragraph I of the Complaint (T. R. 7 and 8).

This Court has jurisdiction, upon appeal, to review the judgment below under U. S. C., Title 28, Sec. 1291.

RULING OF THE COURT BELOW

Minute Entry of October 1949 term, dated Friday, January 20, 1950, for the court below, in this cause, reads as follows (T. R. 31) :

This case comes on regularly for trial this day. Frank E. Flynn, Esquire, United States Attorney and E. R. Thurman, Esquire, Assistant United States Attorney, are present for the Government. Norman S. Hall, Esquire, and James H. Green, Jr., Esquire are present for the defendants, and announce ready for trial.

Frank E. Flynn, Esquire, now states that, due to the inability of the Government to locate its principal witness who is reported to be in Mexico, the Government is not ready for trial and unable to make any showing as to when the witness will be available. Said counsel for the Government now moves for dismissal without prejudice.

IT IS ORDERED that the case be and it is dismissed with prejudice.

STATUTES AND COURT RULES INVOLVED

I

Section 26(b) of the Surplus Property Act of 1944 (50 U. S. C., App., Sec. 1635(b)) reads as follows:

(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person, any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination or conspiracy to do any of the foregoing—

(1) shall pay to the United States the sum of \$2,000 for each such act, and double the amount of any damage which the United States may have

sustained by reason thereof, together with the costs of suit, or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

II

Rule 41 of the Federal Rules of Civil Procedure reads as follows:

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff: by stipulation.* Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all the parties, who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon an order of the court and upon such

terms and conditions as the court deems proper. If a counter-claim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counter-claim can remain pending for independent adjudication by the court. Unless otherwise specified in the order a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury, the court as the trier of facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

STATEMENT OF POINTS

I

It was an abuse of discretion for the court below to have denied plaintiff's motion to dismiss without prejudice, and then to have granted defendant's motion to dismiss with prejudice.

II

It was error for the court below to have dismissed the action with prejudice without having afforded plaintiff the opportunity to protect its cause of action.

ARGUMENT

I

It Was an Abuse of Discretion for the Court Below to Have Denied Plaintiff's Motion to Dismiss without Prejudice, and Then to Have Granted Defendants' Motion to Dismiss with Prejudice

Prior to the adoption of the Federal Rules of Civil Procedure, the plaintiff, at law had an absolute right to discontinue his action at any time prior to the rendering of a verdict or judgment, and this right was recognized as substantial. *Ex Parte Skinner & Eddy Corporation*, (1924), 265 U. S. 86, 92-3, and cases cited. In equity, the complainant ordinarily had the undisputed right to dismiss without prejudice before final hearing. *Ex Parte Skinner & Eddy Corporation*, *supra*, and cases cited; *United Motors Service, Inc. v. Tropic-Aire, Inc.* 8 Cir., (1932), 57 F. (2d) 479, 481-2 and 486, and cases cited; *Jones v. Securities & Exchange Commission*, (1936), 298 U. S. 1, 19-22. The exception was where respondent had acquired some substantial right and where such a right was jeopardized by a potential dismissal without prejudice. As was said in *Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co.*, Cir. Ct., Dist. of Mass., (1902), 121 F. 1015, 1016:

The general rule that a complainant has the right to dismiss his bill at any time before hearing is too firmly established to require any citation of authority. It is equally well-settled that the annoyance to the defendant of a second litigation is no ground for refusing to dismiss the bill. The only question which can arise in any given case is

whether the complainant comes within the exceptions to the rule. These exceptions may be briefly stated: First, where the dismissal would deprive the defendant of some substantial right which has accrued to him since the suit was commenced; second, where the defendant prays for, or is entitled to, some affirmative relief, as for example, where there is a cross-bill.

This doctrine was affirmed by the Supreme Court in *Jones v. Securities & Exchange Commission*, (1936), 298 U. S. 1, where the Court said, at page 22:

* * * plainly enough, under the decisions of this court, the doctrine that a dismissal must be granted if no prejudice be shown beyond the prospect of another suit, *unless there be a specific rule of court to the contrary*, is applicable, and the withdrawal should have been allowed as of course. (Emphasis by the Court).

Since appellees have acquired no material, substantial right since this action was instituted, and have sought no affirmative relief, the appellees have not brought themselves within any recognized exception to the complainant's right to dismiss without prejudice as it existed in federal practice prior to the adoption of the Federal Rules of Civil Procedure.

The effect of the adoption of Rule 41³ of the Federal Rules of Civil Procedure, especially the provisions of paragraph (a)(2) pertaining to supervision of the court, was to codify and make definite preexisting practices as well as to confer upon courts, in all civil actions, the power of equity courts to impose upon a plaintiff's dismissal without prejudice, such terms and conditions as may be proper under the peculiarities of the par-

³ Rule 41(a)(1) of the Federal Rules applies only to voluntary dismissal before answer is filed, and, hence, is inapplicable in the present case. However, Rule 41(a)(2) provides for dismissal without prejudice after answer has been filed, and fits this case perfectly.

ticular case at hand. *Home Owners' Loan Corp. v. Huffman*, 8 Cir., (1943), 134 F. (2d) 314, 317; *Hydraulic Press Mfg. Co. v. Williams, White & Co.*, 7 Cir., (1947), 165 F. (2d) 489, 495. Accordingly, where it is clear on the record that no undue harm need come to defendants, the proper exercise of judicial discretion is confined to the determination of what terms and conditions must be incorporated in the dismissal order to adequately protect defendants.

In March of this year the Court of Appeals for the Seventh Circuit reached this very conclusion in *Bolton v. General Motors Corporation*, 7 Cir., (1950), 180 F. (2d) 379. The court said, at page 381, with reference to Rule 41:

In our view, the absolute right of a plaintiff to dismiss under (a)(2) is restricted only by the requirement that it be done "upon order of the court and upon such terms and conditions as the court deems proper." The discretion of which the authorities speak, and sometimes confusingly, is as to the "terms and conditions" rather than to the right of the plaintiff to have such "terms and conditions" fixed and to dismiss without prejudice upon compliance therewith. * * *

Cf. Lawson v. Moore et al., D. C. for W. D. of Va., (1939), 29 F. Supp. 175; *Wilson v. Jolly*, D. C. for N. D. of Tex. (1948), 7 F.R.D. 649. The *Bolton* case, *supra*, was an appeal from an order granting summary judgment for defendant in a personal injuries action brought in Illinois where the Statute of Limitations barred the action. The plaintiff had sought dismissal without prejudice in order to bring the action in Missouri where the action was not as yet prescribed. Defendant's answer had set up the Statute of Limitations and also averred that a prior settlement, under the Missouri Workmen's Compensation Act, had re-

lieved defendant of its tort liability. The district court had granted defendant summary judgment on the ground, apparently, that the action was barred by the Statute of Limitations. As has been seen, the Court of Appeals sustained plaintiff's contention that the denial of his motion for dismissal without prejudice constituted an abuse of discretion.

The present case is considerably stronger than the *Bolton* case, *supra*, for here appellees have no such favorable equities as a prior settlement or the Statute of Limitations.

On the law as set out above, then, it appears to be thoroughly established in federal jurisprudence that, under Rule 41 (a) (2) of the Federal Rules of Civil Procedure, where it is clear that defendants can be adequately protected from undue harm by the imposition of terms and conditions, the proper exercise of judicial discretion is confined to the determination of what must be the "terms and conditions" of the dismissal without prejudice. Thus a court is not free to deny outright plaintiff's motion for dismissal without prejudice.

In the present case the only injury, aside from the harassment of unsettled potential litigation, cited by appellees was that which may have been caused by the injunction. That such an injury is utterly irrelevant is perfectly obvious on even a moment's reflection. It is elementary that dismissal of the principal suit effects the dissolution of the ancillary injunction in aid of that suit, for on dismissal of the principal suit the injunction becomes *functus officio* and is left without the necessary foundation for any sort of an adjudication. Thus the dismissal without prejudice will remedy the very situation of which appellees complain, so that it is clear that the court below was not faced with anything like a situation in which no "terms and conditions"

will be sufficient to adequately protect defendants from legal prejudice to substantial rights.

That the discretion vested in courts is not arbitrary, but judicial in nature so that well-settled principles of procedure cannot be disregarded under the cloak of discretion appears to be a proposition of law that need not be labored. *International Shoe Co. v. Cool*, 8 Cir., (1946), 154 F. (2d) 778, 780; cert. den. 329 U. S. 726. It is evident, then, that the court below abused its discretion by refusing to apply well-settled law to what amounted to a conceded set of facts. The authorities overwhelmingly declare that plaintiff has the absolute right to dismiss without prejudice, and that this dismissal is to be conditioned only upon adequate protection of certain substantial rights of defendants. In the present case, appellees have not shown themselves in need of any protection, so that appellant's motion should have been granted as a matter of course. Denial of appellant's right to dismiss without prejudice was an abuse of discretion, for, as the late Justice Brandeis said, in *Union Tool Co. v. Wilson*, (1922), 259 U. S. 107, 112:

* * * legal discretion * * * does not extend to a refusal to apply well-settled principles of law to a conceded state of facts. * * *

II

It Was Error for the Court Below to Have Dismissed the Action with Prejudice without Having Afforded Plaintiff the Opportunity to Protect Its Cause of Action

In *Field v. American-West African Line, Inc.*, 2 Cir., (1946), 154 F. (2d) 652, the Court of Appeals for the Second Circuit held that the trial court had not abused its discretion in dismissing the case for want of prosecution when issue had been joined nearly five years earlier, and the plaintiff was presently insane with only

a remote chance of recovering. But, despite this holding, the Court of Appeals modified the judgment in order to permit plaintiff's attorney to elect the alternative of going to trial upon depositions which had already been taken. In other words, the Court of Appeals, in effect, imposed a condition upon the unready plaintiff's action; but it refused to deny absolutely his right of action because of his then present difficulties.

In *Peardon v. Chapman et al.*, 3 Cir., (1948), 169 F. (2d) 909, 913, the Court of Appeals for the Third Circuit said:

* * * the record shows that there were only two delays by plaintiff-appellant. * * *

* * * With no warning of the Court's uncommunicated change of thought as to dismissal, she was not afforded an opportunity of protecting her cause of action.

Under all the facts * * * the dismissal with prejudice of plaintiff-appellant's cause of action was unwarranted.

It is submitted that, in view of the law as set out above, the Government had every reason to confidently rely upon the court below to grant its motion to dismiss without prejudice, so that the denial of that motion came utterly without warning and the Government was deprived of its cause and right of action summarily, with no opportunity to protect its rights.

The action of the court below, in dismissing the case with prejudice, leaving the Government no opportunity whatsoever to bring the case to trial within a reasonable time and to try the case by such means as might be available, was unwarranted and, therefore, error. Certainly the absence of the witness was a severe blow to the Government; but the fact that a plaintiff may labor under a severe and undeserved handicap is not in itself sufficient ground for denying plaintiff a trial on the merits.

The contrary proposition is not and cannot be the law. A plaintiff who is denied the right to a trial on the merits is not at fault for delaying the action. Instead, such a plaintiff is denied the very opportunity for displaying his interest in securing an early decision on the merits. The want of prosecution required to justify summary dismissal with prejudice must be actual and evidenced by past failure to press the litigation. Mere prospective want of prosecution can never justify such a dismissal.

CONCLUSION

The judgment of the district court should be reversed, and the action should be reinstated with instructions for the district court to grant the motion for dismissal without prejudice.

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No. 12,529

IN THE

United States
Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

FRANK WALLACE and R. M. MAKEMSON,
doing business as WALLACE AND WAL-
LACE, a Partnership,

Appellees.

Appellees' Brief

Upon Appeal from the District Court of the United States
for the District of Arizona

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SUBJECT INDEX

	Page
Suggested Amendments of Appellant's Statement of Pleadings and Facts.....	1
Summary of Argument.....	4
Argument	6
I. The Cases Cited by Appellant Do Not Support Appellant's Theory.....	6
II. The District Court Did Not Abuse Its Discretion in Dismissing the Case with Prejudice.....	10
Conclusion	16

TABLE OF AUTHORITIES CITED

	Pages
CASES CITED BY APPELLEES	
American Nat. Bank & Trust Co. v. United States, Ct. App. D.C. (1944), 142 F.2d 571.....	10
Barger v. Baltimore & O. R. Co., Ct. App. D.C. (1942), 130 F.2d 401.....	11
Carlson Hoist & Machine Co. Inc. v. Valentine (1938), 96 F.2d 147.....	11
Carnegie Nat. Bank v. City of Wolf Point, 9 Cir. (1940), 110 F.2d 569.....	10
Cincinnati Traction Bldg. Co. v. Pullman-Standard Car Mfg. Co., D.C. (1938), 25 F. Supp. 322.....	12
Favretto v. Favretto (1948), 86 Cal. A.2d 299, 194 P.2d 748.....	3
Hale v. Uhl (1928), 293 Pa. 454, 143 A. 115.....	3
Hicks v. Bekins Moving & Storage Co., 9 Cir. (1940), 115 F.2d 406.....	14, 15, 16
People v. Superior Court (1948), 86 Cal. A.2d 139, 194 P.2d 571	3
United States v. Pacific Fruit and Produce Co., 9 Cir. (1943), 138 F.2d 367.....	14, 15
United States v. State of Tennessee, D.C. (1947), 74 F. Supp. 637	13
Walker v. Spencer, 10 Cir. (1941), 123 F.2d 347.....	12

CASES CITED BY APPELLANT

Bolten v. General Motors Corporation.....	8
Ex parte Skinner & Eddy Corporation.....	7
Field v. American-West African Line, Inc.....	8

	Pages
Home Owners' Loan Corporation v. Huffman.....	6, 8, 15
Hydraulic Press Mfg. Co. v. Williams, White & Co.....	7
International Shoe Co. v. Cool.....	6, 8, 15
Jones v. Securities & Exchange Commission.....	7
Lawson v. Moore, et al.....	7, 8
Peardon v. Chapman.....	6, 8
Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co.....	7
Union Tool Company v. Wilson.....	7, 8
United Motors Service Inc. v. Tropic-Aire, Inc.....	7, 9
Wilson v. Jolly.....	7, 8

RULES OF COURT

Rule 41(a), Rules of Civil Procedure.....	10
Rule 41(b), Rules of Civil Procedure.....	4, 10, 11
Rule 14, Rules of Practice of the District Court of Arizona.....	3, 12

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**SUGGESTED AMENDMENTS OF APPELLANT'S
STATEMENT OF PLEADINGS AND FACTS**

Appellant's statement of the case is misleading and inaccurate in several respects which will be commented upon hereinafter. Otherwise, it is substantially correct, and need not be restated.

(1) The quoted minute entry of the District Court, dismissing the case with prejudice on January 20, 1950

(Br. 5), omits the following paragraph of the original minute entry (T.R. 31):

“Norman S. Hull, Esquire, objects to dismissal of case without prejudice and moves that case be dismissed with prejudice.”

(2) In order to reflect the fact that on three previous occasions, during a period of time commencing with April 19, 1948, and ending with October 31, 1949, appellees and the District Court, with the knowledge of appellant, had entertained the thought of dismissal of the case for want of prosecution, certain omissions from recitals of the record should be supplied, as follows:

(a) In the recital that the case was called for trial setting on April 19, 1948 (Br. 3), it should appear that the case was called for trial setting, “or other disposition” (T.R. 4).

(b) The recital that when the case was again called for trial setting on February 14, 1949, appellant moved for the trial setting on May 10, 1949 (Br. 3), should reflect that the case was again called for setting “or other disposition”, and that counsel for appellees “suggests dismissal” (T.R. 4), and that the action by the District Court which prompted such activity, was by minute entry of February 2, 1949 (T.R. 28) that:

“It Is Ordered that the general calendar of civil cases in the Phoenix Division of this Court be called Monday, February 14, 1949, at 10:00 o’clock a.m., for trial setting or other disposition pursuant to Rule 14 of this Court.”

(c) In the recital that the case was, on October 31, 1949, set for trial on January 20, 1950 (Br. 4), it should appear that the case was then “called for trial

setting or other disposition pursuant to Rule 14" of the District Court (T.R. 4, 30).

(d) In connection with the foregoing recitals, it should appear that Rule 14 of the District Court provides for calls of the calendar, and for trial settings upon such occasions or upon notice at other times, and that insofar as is here material, reads as follows (T.R. 29):

"* * * Cases in which issue is joined shall be set for trial at the general call of the calendar, or dismissed for want of prosecution, except for good cause shown, the court may continue the same until the next call of the calendar. Cases which have been pending for more than 1 year without any proceedings having been taken therein during such year may be dismissed as of course, for want of prosecution by the court on its own motion at a general call of the calendar."

(3) Appellant's comments to the effect that an offer of compromise was made and rejected (Br. 4) should be disregarded. The record does not show anything other than that appellant's counsel made similar remarks to the District Court (T.R. 41, 42). There was no stipulation filed, nor minute entry made concerning such matter. Moreover, it appears to be well established law that unsuccessful settlement negotiations do not justify denial of a dismissal for want of prosecution. *People v. Superior Court* (1948), 86 Cal. A.2d 139, 194 P.2d 571; *Favretto v. Favretto* (1948), 86 Cal. A.2d 299, 194 P.2d 748; *Hale v. Uhl* (1928), 293 Pa. 454, 143 A. 115.

The record does not indicate whether the alleged offer of compromise was made at the suggestion of, or was encouraged by appellant, or

whether the alleged rejection was prompted by the amount of the alleged offer, or otherwise, but it does show that appellant's comments are irrelevant, because the alleged period of time involved (May 6 to September 7, 1949) was subsequent to the two occasions in April, 1948, and February, 1949, and prior to the third occasion on October 31, 1949, when the District Court called the case, on its own motion, for trial setting or other disposition (dismissal for want of prosecution).

SUMMARY OF ARGUMENT

The issue here involves the exercise of discretion by the District Court, in denying appellant's motion to dismiss the action without prejudice and in granting appellees' motion to dismiss the action with prejudice.

In resolving that issue, this Court is not concerned with whether or not the District Court exercised such discretion wisely (as appellant assumes), but is whether or not the District Court exercised such discretion abusively.

The District Court dismissed the action for want of prosecution, upon the application of the defendants, under *Rule 41(b), Rules of Civil Procedure*. The purpose of *Rule 41(b)* is to prevent unnecessary harassment and delay in litigation. *Rule 41(b)* contemplates and calls for dismissal with prejudice in all cases (whether the order so directs or not), unless the District Court is convinced that the circumstances at hand warrant dismissal without prejudice.

The District Court was not convinced that the circumstances warranted dismissal without prejudice. It was justified, or at least it was not clearly wrong in such conclusion, because:

(1) The plaintiff was not seeking compensation, but was seeking to penalize defendants or to cause defendants to forfeit property in their possession and control, for which plaintiff had received full payment.

(2) The charge against defendants in the complaint was an odious one, which should have been prosecuted with dispatch.

(3) The case had been pending, and defendants' use and control of the property mentioned in the complaint had been curtailed by injunction, for a period of almost three years.

(4) Plaintiff had never, voluntarily and of its own motion, sought to have the case set for trial.

(5) The District Court, on its own motion, had called the case for trial setting or for dismissal for want of prosecution on three occasions.

(6) When the case finally came on regularly for trial, and when defendants announced ready for trial, plaintiff conceded that it was not prepared for trial, and that it could not state when, if ever, it would be so prepared.

(7) Plaintiff asked for dismissal, rather than for a continuance, and thereby invited dismissal with prejudice.

(8) On no occasion had defendants asked to have the case passed, postponed, continued or setting vacated.

(9) Defendants had been compelled to be available to appear, and did appear, and to prepare, and did prepare, to resist the application for temporary injunction, and to defend on the merits of the case, and to arrange for the several trial settings.

(10) Defendants had been put to great expense in appearing and preparing in the case, but could not recoup its costs from the Government.

ARGUMENT

I. The Cases Cited by Appellant Do Not Support Appellant's Theory

Appellant's theory is that the Rules of Civil Procedure merely codified and left unchanged the equity procedure followed in the federal courts prior to the adoption of the rules (Br. 9 to 12), and that under such procedure a plaintiff was entitled to a dismissal at any time (Br. 8), and that the District Court erred in holding otherwise, by refusing dismissal without prejudice and in ordering dismissal with prejudice (Br. 12 to 14).

In one case cited—*Peardon v. Chapman, et al.* (Br. 13)—however, it is expressly stated that:

“* * * Rule 41(b) of the Civil Rules has directly reversed equity's traditional doctrine that a dismissal without consideration of the merits is also without prejudice to the complainant.” (169 F.2d 913)

In two cases cited—*Home Owners' Loan Corporation v. Huffman*, and *International Shoe Co. v. Cool* (Br. 10, 12)—the Court of Appeals for the Eighth Circuit disagreed with, and repudiated, the theory of appellant in the instant case. Judgments were reversed for the failure or refusal of the district courts to order dismissal “with prejudice,” and the court spoke, not only of the right of courts to condition dismissal for benefit of the defendant, but also of the fact that the rule has long prevailed:

“* * * in both law and equity that a plaintiff may dismiss his case without prejudice only by the payment of the costs * * *.” (134 F.2d 317).

The cases cited by appellant are not strictly in point, and can be classified and distinguished from the circum-

stances here prevailing, along the following lines (with some cases falling in more than one classification):

(1) Those which were decided prior to the Rules of Civil Procedure:

Ex Parte Skinner & Eddy Corporation, 1924 (Br. 8);
Jones v. Securities & Exchange Commission, 1936
 (Br. 8, 9);

Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co., 1902 (Br. 8);

Union Tool Company v. Wilson, 1922 (Br. 12);

United Motors Service, Inc. v. Tropic-Aire, Inc., 1932
 (Br. 8).

(2) Those in which the decision is merely that of a district court, exercising discretion under the circumstances there existing, and which present no question of review of such decision:

Lawson v. Moore et al. (Br. 10);

Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co., *ante* (Br. 8);

Wilson v. Jolly (Br. 10).

(3) Those in which the appellate court merely affirms the exercise of discretion by the trial court:

Hydraulic Press Mfg. Co. v. Williams, White & Co.
 —dismissed for want of equity—(Br. 10);

Jones v. Securities & Exchange Commission, *ante*
 (Br. 8, 9);

United Motors Service, Inc. v. Tropic-Aire, Inc., *ante*
 (Br. 8).

(4) Those in which dismissal (whether with or without prejudice) was conditioned upon the payment of defendant's costs and expenses:

Bolten v. General Motors Corporation (Br. 10, 11)
Home Owners' Loan Corporation v. Huffman, ante
 (Br. 10);
International Shoe Co. v. Cool, ante (Br. 12);
Lawson v. Moore, ante (Br. 10);
Wilson v. Jolly, ante (Br. 10).

(5) *Peardon v. Chapman, et al.*, ante (Br. 13), in which dismissal with prejudice was reversed only because the plaintiff was not represented on the occasion of dismissal and the record disclosed that she had been misled by assurance from the court that her action "would not be dismissed with prejudice," whereas the court thereafter "without warning" did dismiss her action with prejudice. The appellate court said that, "With no warning of the Court's uncommunicated change of thought as to dismissal, she was not afforded an opportunity of protecting her cause of action" (169 F.2d 913).

(6) *Union Tool Co. v. Wilson*, ante (Br. 12), which involved discretion in the matter of awarding costs to a party sustaining damage through the violation of an injunction by the other party.

(7) *Field v. American-West African Line, Inc.* (Br. 12), wherein dismissal was suspended for a limited period of ten days to allow plaintiff, who was insane, to proceed to trial upon depositions which had already been taken. The following comment by the court is, however, apropos:

“* * * The delays have not all been the plaintiff’s fault; but the situation has now come to a pass where *some final disposition must be made, for it is not fair indefinitely to expose the defendant to the possibility of liability* upon so remote a chance as the plaintiff’s recovery.” * * * (154 F.2d 652; emphasis supplied).

The opinion in *United Motors Service, Inc. v. Tropic-Aire, Inc.*, ante (Br. 8), contains a clear statement of the principles which control this appeal:

“There may be gathered from the plethora of language employed in the cases in drawing fine distinctions a simple rule, viz., if it is inequitable to permit the dismissal of an equity case it should not be done. Whether it is inequitable is to be determined by the trial court in the exercise of a sound discretion. That discretion is reviewable only if there has been an abuse thereof. (57 F.2d 482).

“* * * * *

“There is danger of an appellate court substituting its judgment as to what should have been done in a situation such as here presented instead of realizing that the exercise of the discretion is for the trial court. * * *

“*If the court had refused to permit a dismissal without prejudice and had dismissed the case on the merits, we could not have said it abused its discretion.* The question for this court is not whether discretion was wisely exercised, but whether it was abusively exercised. We should be very clear in our conviction that the trial court abused its discretion in order to reverse its action. We do not have that abiding conviction.” (57 F.2d 488; emphasis supplied).

II. The District Court Did Not Abuse Its Discretion in Dismissing the Case with Prejudice

Rule 41, Rules of Civil Procedure governs this appeal. *Rule 41* contains two principal subdivisions: Subdivision (a)(1)(2) authorizes dismissal, under the circumstances mentioned therein, upon the application of the plaintiff or by order of court, and provides that such dismissal shall be without prejudice, unless otherwise specified; subdivision (b) authorizes dismissal for want of prosecution, upon the application of the defendant, and provides that such dismissal shall be with prejudice, unless otherwise stated (Br. 6, 7). Thus, where—as dismissal without prejudice is the rule, and dismissal with prejudice is the exception, when the plaintiff is allowed to dismiss or when the court dismisses of its own motion, the legal result is exactly opposite when dismissal is ordered for want of prosecution upon the application of the defendant. Under *Rule 41(b)*, dismissal with prejudice is the rule, and dismissal without prejudice is the exception. *Carnegie Nat. Bank v. City of Wolf Point*, 9 Cir. (1940), 110 F.2d 569; *American Nat. Bank & Trust Co. v. United States*, Ct. App. D.C. (1944), 142 F.2d 571.

The record in this case shows that defendants moved for dismissal for failure of the plaintiff to prosecute, and that this motion was granted, and dismissal was ordered, all under *Rule 41(b)*: The case came on regularly for trial on January 20, 1950; counsel for all parties were present, counsel for defendants “*announced ready for trial*”; counsel for plaintiff announced “*not ready for trial*” because of the inability to locate plaintiff’s principal witness; the court inquired of plaintiff’s counsel as to when such witness

would be available, and plaintiff's counsel announced inability to make any showing on the matter; counsel for plaintiff then requested dismissal without prejudice; counsel for defendants resisted such request, and "moved the court to dismiss the action with prejudice for want of prosecution"; an order was entered on said date, dismissing the case with prejudice, and judgment of dismissal with prejudice was entered on January 24, 1950 (T.R. 31, 32, 38, 39, 41, 42).

The purpose of *Rule 41(b)* is to prevent unnecessary harassment and delay in litigation. *Barger v. Baltimore & O.R. Co.*, Ct. App. D.C. (1942), 130 F.2d 401. The Court of Appeals for the Second Circuit, in *Carlson Hoist & Machine Co., Inc. v. Valentine* (1938), 96 F.2d 147, 148, although speaking specifically of an equity rule of the District Court for the Eastern District of New York, expressed this purpose, as follows:

* * * * Rule 4 was intended to deprive a plaintiff in equity of his ancient power to discontinue his suit at any time at his pleasure, vexing the defendant with repeated litigation; it put the decision within the trial court's discretion. When a plaintiff waits until the cause is called for trial, and until the defendant has fully prepared and attends with his witnesses, it is certainly no abuse of discretion for the judge to hold that 'justice requires' that the cause shall go to decree. To discontinue at such a time is some evidence of a disposition merely to harass the defendant."

This action was instituted on April 14, 1947 (T.R. 2, 15), and had been pending for almost three years before it was dismissed. During this time, appellees' power of control

and disposition over the property involved was drastically curtailed by an injunction (T.R. 1, 3, 16, 24, 25, 26). Plaintiff did not, during any of this time, move for a trial setting upon notice, although it could have done so under *Rule 14* of the Rules of Practice of the District Court (T.R. 1 to 7; 28, 29). The District Court, on its own motion pursuant to such *Rule 14*, called the case for trial setting or other disposition (meaning dismissal for want of prosecution), on three separate occasions—April 19, 1948, February 14, 1949, and October 31, 1949 (T.R. 28, 30). On one of such occasions—February 14, 1949—appellees pressed for dismissal (T.R. 4), but the District Court exercised its discretion in favor of appellant, and set the case for trial in lieu of dismissal, thereby giving appellants another chance to prosecute.

Under such circumstances, it is ridiculous for appellant to suggest that it had “every reason to confidently rely upon the court below to grant its motion to dismiss without prejudice”, and that the denial of its motion came “utterly without warning” (Br. 13). A more appropriate suggestion would be that appellant had “every reason to believe that the court below would dismiss with prejudice”, and that such dismissal came “after repeated warnings”. Appellant invited such dismissal, when it moved for dismissal rather than for a continuance. Dismissal with prejudice for want of prosecution, although plaintiff moves for dismissal without prejudice, is not novel. *Cincinnati Traction Bldg. Co. v. Pullman-Standard Car Mfg. Co.*, D.C. (1938), 25 F. Supp. 322; *Walker v. Spencer*, 10 Cir. (1941), 123 F.2d 347.

The District Court was fully aware of the precise nature of the suit. It knew that plaintiff had received full payment

for the property described in the complaint and covered by its injunction, and that appellant sought to punish appellees for alleged participation in and alleged execution of, an alleged conspiracy to defraud the United States, by restoration of the property or by double payment of the purchase price (T.R. 10; Br. 5, 6). The charge was an odious one. It should have been prosecuted with dispatch, but it wasn't. When it ultimately came on for trial, with appellees ready for trial, it should have been, as it was, disposed of with finality.

Appellees were entitled to be relieved from further harassment through the threat of renewal of the charge against them. This alone warranted dismissal with prejudice. As stated in the opinion in *United States v. State of Tennessee*, D.C. (1947), 74 F. Supp. 637, 638 (concerning dismissal for want of prosecution of a suit to defraud the United States under another statute, which dismissal was not qualified by "without prejudice"):

"* * * Here the defendants have been charged with conspiracy to defraud the United States by presentation of false claims. Such a charge, though it should prove to be groundless, hangs a cloud of infamy over the accused. The offense, if proved against a sovereign state, would be particularly abhorrent. So long as the charge is pending, it points a finger of opprobrium at the accused, and the situation remains fraught with possibility of immense harm, despite the principle that a defendant is presumed innocent until proved guilty. Such a grave charge as is here presented should be prosecuted with dispatch, or dismissed in the absence of impressive reason for delay."

Dismissal for failure to prosecute an action for damages from an alleged conspiracy under the Sherman Anti-Trust

pairment of their defense, because the law will presume injury from unreasonable delay.’” (138 F.2d 372).

This Court then commented upon the situation there which is parallel to the situation here, as follows (138 F.2d 373):

“The plain fact of the matter is that the appellant’s case was not properly prepared; and, in the language of the trial court, ‘it should have been prepared.’ The appellant admitted lack of preparation when its counsel informed the court that ‘certain other witnesses’—whose identity was not specified—could not be brought in, and asked for a voluntary nonsuit. It cannot complain, under all the circumstances of the case, if the court finally decided to dismiss the case with prejudice.

“We have carefully examined the record, keeping in mind these various contentions of the appellant. We find that the trial judge was guilty of no abuse of discretion—either ‘gross’ or slight.”

CONCLUSION

For the reasons and upon the grounds herein reviewed, which are set out specifically in the Summary of the Argument, and upon the authority of the reported decisions of this Court, it is respectfully submitted that the District Court, “was guilty of no abuse of discretion—either ‘gross’ or slight,” and the judgment of the District Court must be affirmed.

EVANS, HULL, KITCHEL & JENCKES
and

NORMAN S. HULL

807 Title & Trust Building
Phoenix, Arizona

Attorneys for Appellees

No. 12530

United States
Court of Appeals
for the Ninth Circuit.

NICK W. MAROOSIS,

Appellant,

vs.

JAMES G. SMYTH, United States Collector of
Internal Revenue,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

JUL 24 1950

PAUL P. O'BRIEN,

No. 12530

United States
Court of Appeals
for the Ninth Circuit.

NICK W. MAROOSIS,

Appellant,

vs.

JAMES G. SMYTH, United States Collector of
Internal Revenue,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

Witnesses, Defendant's—(Continued):

Hedrick, Raymond C.

—direct	231, 244
—voir dire	242
—cross	256
—redirect	274
—recross	276

Witnesses, Plaintiff's:

Bruch, Jay

—direct	163
—cross	174
—redirect	181, 198
—recross	183, 206

Maroosis, Nick W.

—direct	66, 114, 136, 152
—cross	147, 159, 207
—redirect	227
—recross	230

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of David Dellari.....	24
Answer	19
Appeal:	
Appellant's Designation of Record on.....	315
Certificate of Clerk to Record on.....	307
Designation of Contents of Record on.....	61
Notice of.....	60
Statement of Points on Which Appellant Intends to Rely on.....	310
Appellant's Designation of Record on Appeal.	315
Certificate of Clerk to Record on Appeal.....	307
Complaint to Recover Liquor Floor Taxes Il- legally Collected	2
Exhibit A—Claim.....	10
Designation of Contents of Record on Appeal..	61
Findings of Fact and Conclusions of Law.....	50
Judgment	57
Memorandum of Costs and Disbursements.....	59

INDEX	PAGE
Minute Order December 1, 1949—Order Denying Motion to Reopen—Order Judgment Entered in Favor of Defendant—Order Dismiss Complaint	30
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	60
Notice of Motion and Motion for Re-Opening Case	23
Order Overruling Plaintiff's Objections to Findings of Fact and Conclusions of Law Made and Entered by the Court.....	54
Partial Reporter's Transcript.....	286, 294
Plaintiff's Objections to Defendant's Findings of Fact and Conclusions of Law.....	31
Proposed Findings of Fact and Conclusions of Law	36, 46
Reporter's Transcript	63
Statement of Points on Which Appellant Intends to Rely on Appeal.....	310
Stipulation	26
Stipulation Waiving Jury Trial.....	22
Witnesses, Defendant's:	
Harer, George	
—direct	277
—cross	283

NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

Attorney for Plaintiff and Appellant.

FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,

Attorney for Defendant and Appellee.

In the United States District Court for the Northern
District of California, Southern Division

No. 28965-R

NICK W. MAROOSIS,

Plaintiff,

vs.

JAMES G. SMYTH, United States Collector of
Internal Revenue for the First Collection Dis-
trict of California,

Defendant.

COMPLAINT TO RECOVER LIQUOR FLOOR
TAXES ILLEGALLY COLLECTED

Comes now the plaintiff above-named and for
cause of action against the defendant above-named
alleges as follows:

I.

This action arises under the Internal Revenue
Laws of the United States; it is brought pursuant to
the provisions of Section 24 of the Judicial Code,
U.S.C. Title 28, Section 41(5).

II.

That plaintiff is a resident of the City and County
of San Francisco, State of California, and is en-
gaged in business therein. San Francisco is in the
Northern District of California, Southern Division.

III.

That the defendant was at all times since May 14, 1945, to the time of the institution of this proceeding, the duly appointed, qualified and acting United States Collector of Internal Revenue for the First Internal Revenue Collection District of the State of California, and is a resident of the said Northern District of California, Southern Division.

IV.

That on May 1, 1944, plaintiff duly filed his return of floor stocks tax on distilled spirits, malt liquors, and wines as of April 1, 1944, as required by the Revenue Act of 1943. That said return was made on two reports, one showing a tax liability of \$2,749.75 and the other \$3,000.00 or a total tax liability of \$5,749.75. That this return included three stores owned by the plaintiff at 2066 Fillmore Street, 499 Haight Street, and 458 Geary Street, all of San Francisco, California. That the return, in part, showed distilled spirits of 1,713.038 proof gallons of which 1,330.36 represented the proof gallonage at the 458 Geary Street store. That said tax, in addition to \$40.08 representing the tax on merchandise at a fourth store located at 4178 Mission Street, San Francisco, California, or a total of \$5,789.83, was duly paid on July 1, 1944, to Harold A. Berliner, the then Collector of Internal Revenue for the First District of California. That thereafter additional floor stocks taxes in the amount of \$3,744.74 were assessed on the plaintiff as of April 1, 1944,

upon an alleged under-declaration of the inventory of distilled spirits in the 458 Geary Street store. As well an ad valorem penalty of \$4,733.91 was assessed. Said additional assessment in the amount of \$8,478.65 together with interest thereon in the amount of \$1,397.74 aggregating a total of \$9,876.39 was paid by plaintiff to the defendant in installments between June 15, 1946, and February 2, 1948.

V.

That this action is filed to recover the payment of \$9,876.39 plus interest on the grounds that said assessment was completely erroneous and illegal and was protested by plaintiff before payment was made. That the Revenue Act of 1943 imposed a tax on the inventory of all distilled spirits, malt liquors and wines which were on April 1, 1944, owned by a taxpayer and held for sale. The additional assessment was erroneous and illegal because the taxpayer did, on April 1, 1944, take an actual physical inventory of distilled spirits, malt liquors and wines; that said inventory was true and correct and the return duly filed as set forth in Paragraph IV was a true and correct reporting of said inventory and the tax due on said inventory which was duly paid was the true and correct amount due and owing.

VI.

That duly authorized agents and representatives of the Alcohol Tax Unit of the Bureau of Internal Revenue took a physical inventory of the plaintiff's stock in his store at 458 Geary Street, San Fran-

cisco, California, as of May 2, 1944, and by adjusting this inventory back to April 1, 1944, their own computations disclosed that the amount declared for distilled spirits by plaintiff exceeded the actual distilled spirits on hand as of April 1, 1944.

VII.

That in complete disregard of the physical inventory taken by the taxpayer on April 1, 1944, which inventory was true and correct and in further complete disregard of the physical inventory taken by the agents and representatives of the Alcohol Tax Unit on May 2, 1944, and by them adjusted back to April 1, 1944, and in complete disregard of their own computations, that said physical inventory so taken by them and so adjusted back by them disclosed that the return of the plaintiff on May 1, 1944, was true and correct and that the tax paid thereon was the correct tax due and owing, an examining officer of the Alcohol Tax Unit proceeded to compute an estimated inventory for the 458 Geary Street store belonging to plaintiff and computed an estimated inventory based on groundless assumptions, erroneous computations, not based on fact or logic and thereafter assessed the additional tax and penalty herein sued for.

VIII.

The calculation of this examining officer can be summarized as follows:

Inventory of proof gallons of distilled spirits on hand at date of previous filing of Form 758,

November 1, 1942.....631.93 Proof Gal.
Add:

Distilled Spirits purchases November 1,
1942, to March 31, 1944.....12,944.74 Proof Gal.

13,576.67 Proof Gal.

Deduct:

Sales in proof gallons for the period
November 1, 1942, to March 31, 1944.....11,023.46 Proof Gal.

Computed inventory, April 1, 1944..... 2,553.21 Proof Gal.

Inventory reported on Form 758 as of
April 1, 1944, for 458 Geary Street store..... 1,330.36 Proof Gal.

1,222.85 Proof Gal.
Alleged under-declaration

The sum of 1,222.85 proof gallons multiplied by \$3.00 per proof gallon equals \$3,668.55. To this figure, the examining officer added \$76.19 for which no explanation was furnished taxpayer, yielding a tax deficiency of \$3,744.74. To this was added a penalty of 50 per cent of the total tax or an amount of \$4,733.91, resulting in a total assessment of \$8,478.65.

IX.

That the arbitrary assessment herein sued for is incorrect and illegal by reason of the fact that it is contrary to the actual physical inventory taken by the United States Alcohol Tax Unit on May 2, 1944, and adjusted back to April 1, 1944, and is contrary to the true and correct inventory taken by the plaintiff and reported to the Bureau of Internal Revenue

as set forth in Paragraph IV; that the said arbitrary assessment is also based upon incorrect data. The sales in proof gallons are shown as 11,023.46. They should have been shown as 12,404.20 proof gallons. This would result in a computed inventory at April 1, 1944, of 1,172.47 proof gallons which is less than the 1,330.36 proof gallons reported by the taxpayer. As well, the entire analysis is based on unsupported assumptions contrary to fact.

X.

That the fraud penalty levied and assessed and collected by the defendant is invalid in that the tax assessment of \$3,744.74 is based on artificial bases and illegal grounds and constitutes no basis for the application of a penalty for fraud; that said penalties for fraud are limited to deficiencies due to fraud with intent to evade the tax; that plaintiff has during all of the times herein referred to denied the existence of any deficiency and questioned the arbitrary assessment and denied the existence of any deficiency for floor tax, denied any fraudulent intent to exceed the tax and still so denies the existence of any such fraudulent intent.

XI.

Plaintiff duly filed his claim for refund of said payment of \$9,876.39. Said claim was made and filed in accordance with the provisions of the law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, and alleged as the basis for said claim the same grounds and facts hereinbefore alleged and herein relied

upon. That copy of said claim is attached hereto as Exhibit "A," incorporated herein and made a part hereof as though set forth at this point word for word.

XII.

That at the time of the filing of the said claim for refund, to-wit: Exhibit "A," plaintiff's agent handling said matter was advised by the office with which said claim was filed that in due course an agent would discuss this matter with the said agent of the plaintiff in an effort to determine the correctness of said claim and that no action would be taken thereon without such a conference; that it has become by usage and common practice between the Commissioner of Internal Revenue and certified public accountants generally that such claims for refund are not rejected unless such a conference is first had.

That without such a conference being called or had, on February 15, 1949, said claim for refund filed as alleged in Paragraph XI hereof was rejected and disallowed in full by the Commissioner of Internal Revenue. That notice of the rejection and disallowance of said claim for refund was mailed to plaintiff by registered mail by said Commissioner on February 15, 1949.

XIII.

That no part of said sum of \$9,876.39 erroneously and illegally collected from the plaintiff by defendant, as aforesaid, has been repaid or refunded, and said sum of \$9,876.39, together with interest

thereon as provided by law, is due, unpaid and owing to the plaintiff from the defendant.

Wherefore, plaintiff prays that it have and recover of and from the defendant the sum of \$9,-876.39, together with interest thereon, as provided by law, and costs of suit incurred herein, and for such other and further relief as the Court may deem just and proper in the premises.

/s/ MORRIS M. GRUPP,

/s/ LEON SCHILLER,

Attorneys for Plaintiff.

State of California,

City and County of San Francisco—ss.

Nick W. Maroosis being first duly sworn deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

/s/ NICK W. MAROOSIS.

Subscribed and sworn to before me this 16th day of June, 1949.

[Seal] /s/ LOUIS WIENER,

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A"

Claim

To Be Filed With the Collector Where Assessment Was
Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- [X] Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- [] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- [] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California

County of San Francisco

} ss:

Name of taxpayer or purchaser of stamps Nicholas W. Maroosis
Business address 2066 Fillmore Street, San Francisco, California.
Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 1st District—Calif.
2. Period (if for income tax, make separate form for each taxable year) April 1, 1944.
3. Character of assessment or tax Alcohol Floor Stocks Tax.
4. Amount of assessment, \$ * ; dates of payment *.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded \$9,876.39, or such greater amount as is legally refundable.
7. Amount to be abated (not applicable to income, gift, or state taxes)
8. The time within which this claim may be legally filed expires, under Section 3313 Internal Revenue Code, on June 15, 1950.

The deponent verily believes that this claim should be allowed for the following reasons:

* See statement attached.

The attached statement constitutes a part of this claim for refund and it is duly sworn to in this affidavit as a part hereof.

Signed /s/ NICHOLAS W. MAROOSIS

Sworn to and subscribed before me this 6th day of August, 1948.

/s/ FRED T. AINSLIE.

(Signature of officer administering oath)

Certificate

[No data filled in.]

Nicholas W. Maroosis
2066 Fillmore Street, San Francisco, California

Statement

1. The amounts of assessment and dates of payment are set forth as follows:

Assessments:

May 1, 1944—Original return, Form 758.....	\$ 2,749.75
May 1, 1944—Amended (supplemental) return, Form 758....	3,000.00
Tax on distilled spirits at 5178 Mission Street, San Francisco, paid on July 1, 1944, without receipt of notice of assess- ment. See tabulation of August 8, 1945, by J. H. Maloney..	40.08

Total assessed originally.....\$ 5,789.83

April 21, 1945—Additional assessment of floor stocks tax and
and penalty was made based upon a computed inventory
figure which was determined by using a preceding inven-
tory, adding purchases and deducting sales, and assuming
that distilled spirits sales amounted to 86% of total sales.
The additional assessment was first computed at a total of
\$10,498.81.

April 26, 1945—A claim for abatement was filed by the tax-
payer in the amount of \$10,498.81.

March 12, 1946—An amended bill was issued based upon the
same method of computation as that used in the April 21,
1945, assessment, but with certain errors in calculation re-
moved. The amended bill was in the amount of.....\$ 8,478.65

Total of original and additional assessments.....\$14,268.48

Under date of April 5, 1946, a Warrent of Distress was issued against
the taxpayer. In order to continue the orderly operation of his business,
the taxpayer was forced to sign an agreement to pay the additional as-
sessment and interest thereon from April 21, 1945, at the rate of \$500.00
per month beginning June 15, 1946. Payments were made under pro-
test, and on the dates and in the amounts listed below:

Payments:

Payment of the original assessments were made as follows:

Date of Check	Month Returned by Bank	Check No.	Collector's Reference No.	Amount Paid
July 1, 1944	July, 1944	692	4131	\$ 579.61
July 1, 1944	July, 1944	1517	4131	4,182.45
July 1, 1944	July, 1944	1703	4131	987.69
July 1, 1944	July, 1944	1518	4773	40.08

Total of payments on July 1, 1944.....\$ 5,789.83

Payment of the additional assessments was made as follows:

Date of Check	Month Returned by Bank	Check No.	Collector's Reference No.	Amount Paid
June 15, 1946	June, 1946	3069	1957	\$ 500.00
July 15, 1946	July, 1946	3118	2501	500.00
Aug. 19, 1946	Sept., 1946	1015	3672 and 3846	500.00
Sept. 27, 1946	Nov., 1946	1074	5429	500.00
Oct. 26, 1946	Nov., 1946	1135	5564	500.00
Dec. 11, 1946	Dec., 1946	1236	6726	500.00
Dec. 23, 1946	Feb., 1947	1256	7249	500.00
Feb. 27, 1947	Apr., 1947	1348	9580	500.00
Apr. 15, 1947	May, 1947	1449	10880	500.00
Apr. 15, 1947	May, 1947	1450	10542	500.00
June 10, 1947	July, 1947	1546	98	500.00
June 16, 1947	July, 1947	1551	98	500.00
July 22, 1947	Aug., 1947	1604	1131	500.00
Sept. 2, 1947	Oct., 1947	1719	2713	500.00
Oct. 15, 1947	Nov., 1947	1800	3500	500.00
Nov. 6, 1947	Dec., 1947	1837	4250	500.00
Dec. 23, 1947	Jan., 1948	1927	4881	500.00
Jan. 19, 1948	Feb., 1948	1971	5173	500.00
Feb. 2, 1948	Feb., 1948	2022	5437	876.39

Total of payments made on the additional assessments, and interest charges.....	\$ 9,876.39
---------------------------------------------------------------------------------	-------------

Total of all payments made by the taxpayer incident to the floor stocks tax assessments	\$15,666.22
-----------------------------------------------------------------------------------------------	-------------

2. Grounds upon which this claim is based:

This claim for refund is filed in order to recover, with interest, the amount of an additional assessment of floor stocks tax and penalty, \$8,-478.65, and interest thereon, \$1,397.74, aggregating in total \$9,876.39. This sum was paid by the taxpayer under protest, and the grounds upon which a refund of the entire amount is claimed are set forth below:

The taxpayer on April 1, 1944, took an actual physical inventory of distilled spirits, malt liquors, and wines and filed proper returns on May 1, 1944, disclosing total tax due in the amount of \$5,749.75. Included in the return were distilled spirits amounting to 1,713.038 proof gallons, of which 1,330.36 represented the total gallonage at 458 Geary Street, San Francisco, where one of his four places of business was operated under the name of Joseph's Liquor Store. Subsequently floor stocks tax at the rate of \$3.00 per gallon was paid on July 1, 1944, as

shown above, along with payment of other floor stocks tax due on beers and wines.

On May 2, 1944, an actual physical inventory of Joseph's Liquor Store stocks was taken by representatives of the Alcohol Tax Unit, and the result of adjusting this inventory back to April 1, 1944, disclosed the following:

Distilled spirits on hand per A.T.U.	
physical inventory of May 2, 1944.....	1,029.37 pg.
In warehouse	912.00
	<hr/>
Total.....	1,941.37 pg.
Purchases, April, per invoices.....	1,106.55 pg.
Less sales for same period.....	386.57
	<hr/>
Balance, excess of purchases over sales.....	719.98
	<hr/>
Difference, would be on hand April 1, 1944.....	1,221.39 pg.
	<hr/> <hr/>

This amount compared with the total of 1,330.36 pg. declared for Joseph's Liquor Store on returns filed for April 1, 1944, reflects an over-declaration in the amount of 108.97 pg.

In complete disregard of the physical inventory taken by the taxpayer on April 1, 1944, and of the physical inventory taken on May 2, 1944, by representatives of the Alcohol Tax Unit and adjusted back to April 1, 1944, the examining officer from the Alcohol Tax Unit proceeded to compute an estimated inventory based on various assumptions and use the figures thus obtained as a basis for assessing additional tax and penalty. The computation used by the examining officer, after eliminating various errors in calculation was essentially as follows:

Inventory in proof gallons:

Inventory of proof gallons on hand at date of previous filing of Form 758, November 1, 1942.....	631.93 pg.
Add—Distilled spirits purchases November 1, 1942, to March 31, 1944, per Alcohol Tax Unit audit of invoices in wholesale liquor dealers' files.....	12,944.74
	<hr/>
Total.....	13,576.67 pg.
Deduct—Sales in proof gallons, as computed below, for the period November 1, 1942, to March 31, 1944	11,023.46
	<hr/>
Computed inventory, April 1, 1944.....	2,553.21 pg.
Inventory reported in Form 758 as of April 1, 1944....	1,330.36
	<hr/>
Alleged under-declaration	1,222.85 pg.
	<hr/> <hr/>

Sales in proof gallons :

Gross sales in dollars for the period November 1,
1942, to March 31, 1944.....\$276,328.51

Equivalent in proof gallons :

Deduct State sales tax :

At 3% for the entire period November 1, 1942,
to March 31, 1944 (this should have been at
3% for the period November 1, 1942, to June
30, 1943, and at 2½% for the period July 1,
1943, to March 31, 1944) 8,048.41

Net Sales\$268,280.10

Using the assumption that 86% of total sales were
distilled spirits sales, the dollar value would be.....\$230,720.88

This figure is converted to proof gallons by dividing
by \$20.93, the selling price per proof gallon as com-
puted by the State Board of Equalization.

Sales in proof gallons, $\$230,720.88 \div \20.93 11,023.46 pg.

Computation of additional tax and penalty :

Tax due on Form 758 (includes \$9.43 correction per
A.T.U. audit)\$ 5,799.26

Add—Alleged under-declaration, 1,222.85 pg.
at \$3.00 3,668.55

Total.....\$ 9,467.81

Ad valorem penalty 50% of \$9,467.81..... 4,733.91

Alleged total assessment\$ 14,201.72

Deduct—Tax paid 5,789.83

Balance\$ 8,411.89

Minor unidentified difference included in A.T.U.
computation 66.76

Amount of amended bill issued, March 12, 1946.....\$ 8,478.65

It should be noted in the foregoing computation of sales in terms of proof gallons that 86% of total sales were assumed to be distilled spirits sales. The figure of 86% and even lower percentages were applicable in earlier years in segregating total sales as between distilled spirits sales and other sales, but during the war years 1943 and 1944 the percentage of distilled spirits sales to total sales was much higher. The heavy increase in sales volume was in whiskey and other distilled spirits rather than in wine, beer, and miscellaneous items.

Instead of 86%, the examining officer should have used a percentage figure not lower than 96% in computing the proportion of sales represented by distilled spirits sales. In support of the higher percentage figure the taxpayer submits the following evidence of the applicability of the higher figure:

- (1) Attached as Exhibit "A" is a photostatic copy of a certified audit report prepared by W. E. Holcombe, an auditor of the California State Board of Equalization, covering an audit of the four quarterly periods ended June 30, 1944. This report was transmitted officially to the taxpayer on August 25, 1944, and it served as the basis for an additional license fee assessment of \$750.00 which was paid by the taxpayer.

The audit report states specifically on Line 6 of the back page that audited distilled spirits sales are 96.41% of gross sales.

Reported sales, as shown on the same page, were 60% to 86% of total sales. Upon receipt of the audit report, the taxpayer realized that the lower percentages used for reporting purposes, which were estimates based upon experience in prior years, were entirely too low. He therefore accepted the findings of the State auditor and paid the additional license which was assessed on the basis of the audit report.

- (2) As a further check on the accuracy of the higher percentage of distilled spirits sales to total sales, the taxpayer has made a complete analysis of all sales at the 458 Geary Street store for the three months' period, January 1 to March 31, 1944, the period immediately prior to April 1, 1944, which is the date of the inventory on which the tax is computed.

The total sales analyzed amounted at selling prices, exclusive of sales tax, to \$87,882.90; of this sum, distilled spirits sales were found to comprise a total of \$86,054.86 or 97.9%.

The regular quarterly sales and Use Tax Return submitted by the taxpayer to the California State Board of Equalization for the same three months ended March 31, 1944, reported total taxable sales of \$89,529.17 and tax due and paid at 2½% thereon in the amount of \$2,238.23. If the total figure of \$89,529.17 is compared with the positively identified distilled spirits sales amounting to \$86,054.86, the percentage of the latter to the total is found to be 96.1%.

In view of the foregoing, it is contended that any attempt to arrive at a computed inventory figure on April 1, 1944, by reference to an earlier inventory on November 1, 1942, with appropriate adjustments for purchases and sales during the intervening period of seventeen months between November 1, 1942, and April 1, 1944, in order to be reasonably accurate must reflect distilled spirits sales as representing at least 96% of total sales. The percentage of 96.41% established by an independent audit by a State employee covering the major portion of the sales during the period between the key inventory dates stands as the best evidence available for purposes of computation. A constructed inventory, using this figure of 96.41%, discloses the following:

Inventory in proof gallons:

Inventory of proof gallons on hand at date of previous filing of Form 758, November 1, 1942 (not in dispute)	631.93 pg.
Add—Distilled spirits purchases November 1, 1942, to March 31, 1944, per Alcohol Tax Unit audit of invoices in wholesale liquor dealers' files (not in dispute)	12,944.74
Total.....	13,576.67 pg.
Deduct—Sales in proof gallons, as computed below, for the period November 1, 1942, to March 31, 1944..	12,404.20
Computed inventory at April 1, 1944.....	1,172.47 pg.
Inventory reported in Form 758 as of April 1, 1944, based on actual physical inventory taken.....	1,330.36
Overdeclaration on basis of computed inventory.....	157.89 pg.

Sales in proof gallons:

Gross sales in dollars for the period November 1, 1942, to March 31, 1944 (not in dispute).....\$276,328.51

Equivalent in proof gallons:

Deduct State sales tax:

Sales 11/1/42 to 6/30/43—\$ 63,668.09 at 3% \$1,854.41

Sales 7/1/43 to 3/31/44— 212,660.42 at 2½% 5,186.84

Total.....	\$276,328.51	7,041.25
------------	--------------	----------

Net sales	\$269,287.26
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Using the percentage of 96.41% as representing the proportion of distilled spirits sales to total sales, as developed by independent audit of State auditor, the dollar value of distilled spirits sales would be....\$259,619.85

Converting the dollar value to proof gallons at the selling price of \$20.93 (developed by the State Board of Equalization) the sales in proof gallons would be 12,404.20 pg.

Summary

The foregoing information submitted in support of this claim for refund is summarized as follows:

- (1) The taxpayer actually made an accurate count of inventory on hand at April 1, 1944; he filed appropriate returns on Form 758 when due on May 1, 1944, and paid the tax called for by the returns on July 1, 1944.
- (2) An Alcohol Tax Unit examining officer took a physical inventory on May 2, 1944, one month after the key date, and by adjustments

for purchases and sales during the intervening month reconstructed an inventory figure for April 1, 1944. The inventory thus computed was found to be approximately 109 proof gallons lower than the total which the taxpayer had declared on Forms 758.

- (3) In complete disregard of the evidence of the accuracy of the inventory shown on the returns, and of the findings of the check made on May 2, 1944, the examining officer arbitrarily and erroneously computed an inventory figure by taking a November 1, 1942, inventory figure, adding thereto purchases for the intervening seventeen months to April 1, 1944, and deducting from the sum thus obtained a portion of the sales, using the assumption that distilled spirits sales represented only 86% of total sales. By this computation an under declaration of 1,222.85 proof gallons was alleged, and to the revised total tax a 50% penalty was added.
- (4) The taxpayer submitted and now resubmits evidence consisting of the findings of an independent auditor of the California State Board of Equalization to the effect that distilled spirits sales for the year ended June 30, 1944, for this taxpayer at his 458 Geary Street store represented 96.41% of total sales.
- (5) The taxpayer has now made a detailed analysis of sales tickets for the three months' period immediately preceding the inventory date April 1, 1944. The analysis covered 98.2% of all sales for the three months; of the sales tickets analyzed, it was found that 97.9% represented distilled spirits sales.
- (6) In order to obtain further time in which to prove the accuracy of his original declaration, and in order to mitigate the effect of a warrant of distress and to continue the orderly operation of his business, the taxpayer was forced in 1946 to sign an agreement to pay the arbitrary additional assessment and interest at the rate of \$500.00 monthly. He has now completed these payments, and is filing this claim for the purpose of recovering in full with interest the amounts erroneously and illegally collected.

Statement By Agent

This claim for refund was prepared by us on behalf of Messrs. John F. Forbes & Company, Crocker Building, San Francisco, California, from data obtained from the taxpayer and from his files and records. This information, while not known to be true, is true to the best of our knowledge and belief.

/s/ SCOTT H. DUNHAM.

/s/ CHARLES E. ROBINSON.

Retail Distilled Spirits License Fee Audit Report

License Numbers C 4574 G

Licensee Nick W. Maroosis & Michael M. Kosloff

DBA Joseph's

Address 458 Geary Street, San Francisco, 2, California

File No. 15787

Quarter Ending	Distilled Spirits Sales Reported	Distilled Spirits Sales Audited	Licensee Fee Paid	License Fee Required	Additional Fee Due
9/30/43	\$ 17,633.51	\$ 26,413.23	\$ 180.00		
12/31/43	58,675.58	87,890.15	590.00		
3/31/44	60,566.48	90,722.53			
6/30/44	14,441.52	21,631.95	750.00		
Totals.....	\$151,317.09x	\$226,657.86	\$1,520.00	\$2,270.00	\$750.00
Total Additional Fee Due \$750.00					

I Hereby Certify That I have audited the records of the above licensee for the period specified; and that in my opinion this report correctly reflects the license fee liability of said licensee for the periods stated.

/s/ W. E. HALCOMBE.

Dated August 23, 1944.

Approved by C. F. Wentworth.

Note: x Previously audited to 6-30-1943.

AC

3-14-44

Audit Report

Description of Operations

1. Type of Organization:
Partnership.2. Class of Business
Retail Liquor Store.

Audit

1. What method was used to arrive at audited sales?
Cost of sales plus gross profit plus sales tax.
2. If on cost plus mark-up basis:
 - A. What percentage of mark-up was used? 33 1/3.
 - B. Were inventory fluctuations considered? Yes.
3. What procedure was followed to arrive at percentage of mark-up?
Average gross profit realized from a number of items in licensees' stock.
4. Is "Computation of Mark-Up" schedule attached? No.
5. Are distilled spirits excise tax and sales tax included in audited sales? Yes.
6. Audited Distilled Spirits sales are 96.41% of gross sales.

Report

1. Method used by licensee to arrive at reported sales :
Reported sales were 60 to 86% of total sales.
2. What instructions were given licensee relative to preparation of future reports? None—This is a close-out.

Records

1. Do records meet requirements of section 24.4 of the Alcoholic Beverage Control Act and the Rules and Regulations issued thereunder?
Yes.

/s/ W. E. HOLCOMBE,
Auditor.

Date August 23, 1944.

[Endorsed]: Filed June 22, 1949.

[Title of District Court and Cause.]

ANSWER

The defendant herein, James G. Smyth, Collector of Internal Revenue for the First Collection District of California, appearing by his attorney Frank J. Hennessy, United States Attorney in and for the United States District Court for the Northern District of California, in answer to the allegations of the complaint herein, alleges, admits and denies as follows:

I.

The allegations contained in paragraph I are admitted.

II.

The allegations contained in paragraph II are admitted.

III.

The allegations contained in paragraph III are admitted.

IV.

The allegations contained in paragraph IV are denied except that the defendant admits plaintiff filed the said tax return as alleged and paid the said taxes to the defendant as alleged and that thereafter the plaintiff paid the additional taxes and penalties assessed in the total amount of \$9,876.39.

V.

The allegations contained in paragraph V are admitted except that the defendant denies the inventory as filed by the plaintiff was true and correct as to the quantities of distilled spirits subject to the payment of the additional taxes thereon; further answering the defendant denies that the amount of taxes paid by the plaintiff on plaintiff's inventory of distilled spirits on hand was the true and correct amount owed to the defendant.

VI.

The allegations contained in paragraph VI are admitted except that the defendant alleges the changes and differences of the quantity of distilled spirits, as then computed by agents of the United States, was caused by errors and omissions in the records kept by the plaintiff at his place of business.

VII.

The allegations contained in paragraph VII are denied except that the defendant admits that pursuant to a later and corrected inventory of distilled spirits subject to the additional taxes owed by the

plaintiff the said additional taxes and penalty, as later sued for, were assessed against the plaintiff.

VIII.

The allegations contained in paragraph VIII are admitted.

IX.

The allegations contained in paragraph IX are denied.

X.

The allegations contained in paragraph X are denied.

XI.

Answering paragraph XI, the defendant admits the said claim for refund was filed as therein alleged but denies the allegations therein.

XII.

Answering paragraph XII, the defendant admits the said claim for refund was disallowed by the Commissioner of Internal Revenue on February 15, 1949; further answering paragraph XII, the defendant alleges that the plaintiff, although repeatedly requested to do so, failed and refused to appear before agents of the United States, with his records, for a conference and discussion of his refund claim with said officers.

XIII.

The allegations contained in paragraph XIII are denied except that the defendant admits the said taxes of \$9,876.39, with interest, have not been refunded to the plaintiff.

Wherefore, the defendant having fully answered, prays that the suit be dismissed with costs to defendant.

/s/ FRANK J. HENNESSY,
United States Attorney.

[Endorsed]: Filed August 18, 1949.

[Title of District Court and Cause.]

STIPULATION WAIVING JURY TRIAL

It Is Hereby Stipulated by and between counsel for the respective parties that the jury trial heretofore demanded in the above-entitled action is waived.

Dated: This 8th day of November, 1949.

/s/ LEON SCHILLER,

/s/ MORRIS M. GRUPP,
Attorneys for Plaintiff.

FRANK J. HENNESSY,
Attorney for Defendant.

/s/ C. ELMER COLLETT,
Asst. U. S. Attorney.

[Endorsed]: Filed November 16, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR
RE-OPENING CASE

To The Defendant Above-Named And To Frank J.
Hennessy, United States Attorney, Attorney
For Defendant:

You, and Each of You, Will Please Take Notice that the plaintiff above-named will on Thursday, December 1, 1949, at the hour of 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, move the above-entitled Court to re-open the trial of the above-entitled action for the purpose of introducing the testimony of David Dellari in line with the affidavit of the said David Dellari annexed to this motion.

Said motion will be made upon the ground that the information contained in the said affidavit of David Dellari was unknown to the plaintiff and the plaintiff had no reason for the knowledge thereof until the testimony of defense witness *of* Raymond C. Hedrick indicated that he followed a certain truck to the address of the said David Dellari; that the said witness Hedrick did not in said testimony advise the Court of his further investigation of the said address nor of his discussions and investigation as set forth in the affidavit hereto annexed; that the information contained in said affidavit is material to the issues of this case on behalf of plaintiff.

This motion is being made upon all the testimony, records and files in the above-entitled action and

upon the affidavit of the said David Dellari hereto annexed and upon such oral testimony as may be adduced at the time of the hearing of this motion.

Dated: This 25th day of November, 1949.

LEON SCHILLER, ESQ.,

MORRIS M. GRUPP, ESQ.,

By,

Attorneys for Plaintiff.

[Endorsed]: Filed November 26, 1949.

[Title of District Court and Cause.]

AFFIDAVIT OF DAVID DELLARI

State of California,

City and County of San Francisco—ss.

David Dellari, being first duly sworn, upon oath, deposes and says:

That he has been for several years last past the owner of those certain premises known as 1348-50 San Bruno Avenue, San Francisco, California, and was the owner of the said premises during the months of March and April of 1944; that for approximately two years prior to April 1, 1944, and for several months thereafter your affiant rented space in the garage in the premises aforementioned to two individuals, one Tommy Riggs and one Frank O'Connor; that the said Tommy Riggs rented the

space in said garage for the purpose of storing therein his automobile; that Frank O'Connor rented space in said garage for the purpose of storing therein his truck and also as a storage place for pinball machines; that during the month of March and around the 1st of April, 1944, the said O'Connor was so storing pinball machines in said garage, that on or about the 1st day of April, 1944, three men from the Alcohol Tax Unit, Department of Internal Revenue of the United States, called on your affiant and requested permission of your affiant to examine the said garage to determine whether there was any whiskey stored therein, which said whiskey your affiant was informed was subject to floor stock tax; that your affiant accompanied the said three men from the Alcohol Tax Unit to his garage and there they examined the said garage and found therein pinball machines there stored belonging to O'Connor but there was no whiskey or any evidence of there having been any whiskey stored therein.

That thereafter upon the request of the said agents of the Alcohol Tax Unit your affiant together with Frank O'Connor called at the Alcohol Tax Unit at 100 McAllister Street in the City and County of San Francisco, State of California, where they were questioned by agents of that department relative to delivery of whiskey to the said premises; that both your affiant and the said O'Connor denied any knowledge of any such delivery of whiskey to the said premises.

That at the time aforementioned, to-wit: April 1, 1944, when the three agents of the Alcohol Tax Unit

called at the home of your affiant at 1348 San Bruno Avenue, your affiant informed the said agents that the said garage was rented to the said Tommy Riggs and Frank O'Connor.

That your affiant does not know any of the parties to the above-entitled action and met the plaintiff above-named for the first time so far as he remembers on November 21, 1949, at approximately 5:00 o'clock p.m. when the said plaintiff called at your affiant's home and questioned him relative to the occupants of his garage at the premises aforementioned on the dates aforementioned.

/s/ DAVID DELLARI,

1348 San Bruno Avenue,
City.

Subscribed and sworn to before me this 23rd day of November, 1949.

[Seal] /s/ LOUIS WIENER,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed November 26, 1949.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between Morris M. Grupp, Esq., and Leon Schiller, Esq., Attorneys for Plaintiff in the above-entitled matter, and Frank

J. Hennessy, Esq., United States Attorney, appearing herein on behalf of the defendant, as follows, to-wit:

1. That the gross sales exclusive of sales tax as reflected on the books of the plaintiff for his store known as Joseph's Liquor Store, 458 Geary Street, San Francisco, California, between the dates of November 1, 1942, to June 30, 1943, is the sum of.....\$ 61,813.68

2. That the gross sales exclusive of sales tax as reflected on the books of the plaintiff for his store known as Joseph's Liquor Store, 458 Geary Street, San Francisco, California, between the dates of July 1, 1943, to March 31, 1944, is the sum of.....\$207,473.58

3. That if the Court finds from the evidence that 86 per cent of the gross sales between the period of November 1, 1942, to June 30, 1943, were sales of distilled spirits that the sales of distilled spirits for the period from November 1, 1942, to June 30, 1943, would be..... 53,159.76

4. That if the Court finds from the evidence that 96.41 per cent of the gross sales between the period of July 1, 1943, to March 31, 1944, were sales of distilled spirits that the sales of distilled spirits for the period from July 1, 1943, to March 31, 1944, would be..... 200,025.28

5. That the total distilled spirits sales for the period from November 1, 1942, to March 31, 1944, would be.....\$253,185.04

6. If the Court finds that the selling price per proof gallon is the sum of \$20.93 that the total sales of distilled spirits in the sum of \$253,185.04 would equal.... 12,096.75
proof gal.

7. That the assessment in question in this action listed the total proof gallons sold from November 1, 1942, to March 31, 1944, as..... 11,023.46
proof gal.

8. That if all of the above percentage figures are found by the Court to be the correct percentages to be used in calculation that the assessment herein in question understated the number of proof gallons sold by the plaintiff by..... 1,073.29
proof gal.

9. That the assessment herein in question assessed the plaintiff for an understatement of..... 1,222.85
proof gal.

10. Additional proof gallons sold by plaintiff as above set forth..... 1,073.29
proof gal.

11. Using the method of calculation on a percentage basis adopted by the Alcohol Tax Unit in checking distilled

spirits on hand as of April 1, 1944, in possession of plaintiff at his 458 Geary Street store such percentage calculations would determine an understatement by plaintiff in his return of..... 149.56
proof gal.

12. It Is Further Stipulated that it is the consensus of opinion of the certified public accountants of the plaintiff and the investigators for the Alcohol Tax Unit that a percentage calculation in which there is an apparent understatement or overstatement of approximately one per cent of the proof gallons purchased and sold during a given period is sufficient to confirm a physical inventory.

Dated: This 18th day of November, 1949.

/s/ MORRIS M. GRUPP,

/s/ LEON SCHILLER,

Attorneys for Plaintiff.

FRANK J. HENNESSY,

Attorney for Defendant.

/s/ C. ELMER COLLETT.

[Endorsed]: Filed November 29, 1949.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 1st day of December, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Lloyd L. Black,
District Judge.

[Title of Cause.]

ORDER DENYING MOTION TO REOPEN—
ORDER JUDGMENT ENTERED IN
FAVOR OF DEFENDANT—ORDER DIS-
MISSING COMPLAINT

This case came on regularly this day for hearing on motion to reopen and for submission. Ordered that said motion be denied and judgment entered in favor of defendant. Complaint ordered dismissed, defendant to file findings.

In the United States District Court for the Northern District of California, Southern Division

No. 28965-R

NICK W. MAROOSIS,

Plaintiff,

vs.

JAMES G. SMYTH, United States Collector of Internal Revenue for the First Collection District of California,

Defendant.

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

Plaintiff objects to defendant's proposed Finding of Fact No. III on the grounds that there is no evidence in the record to warrant such finding that the floor stock tax return of the plaintiff filed on May 1, 1944, disclosed that of the 400 cases of Three Rivers Whiskey removed from the warehouse on March 30 and 31, 1944, plaintiff declared $271\frac{1}{3}$ cases on hand as of April 1, 1944. That the records of sales of the plaintiff disclosed the sales on March 30 and 31, 1944, of $128\frac{2}{3}$ of Three Rivers Whiskey, thus accounting fully for the 400 cases removed from the warehouse on March 30 and 31, 1944.

II.

Plaintiff objects to defendant's proposed Finding of Fact No. IV on the same grounds as hereinabove set forth as objections to proposed Finding of Fact No. III and in this regard plaintiff points out that if the inventory of May 2, 1944, taken by the agents of the Alcohol Tax Unit did not account for the 200 cases of Three Rivers Whiskey removed from the warehouse on March 31, 1944, and the 100 cases of whiskey allegedly stored in the basement of the Haight Street store or a total of 300 cases, then there is no explanation by the evidence in this case for the existence of $271\frac{1}{3}$ cases of Three Rivers Whiskey declared on hand as of April 1, 1944, in the Geary Street store return and no explanation of the $128\frac{2}{3}$ cases sold on March 30 and 31, 1944, according to the records of the plaintiff. In effect by pure mathematics and the application of common sense to the evidence in this case if we consider that the plaintiff declared $271\frac{1}{3}$ cases of Three Rivers Whiskey on hand on April 1, 1944, in his Geary Street store and $128\frac{2}{3}$ cases sold according to his records on March 30 and 31, 1944, which accounts in turn for 400 cases according to the undisputed evidence in this case and if in addition thereto, the Court finds that there were 300 cases unaccounted for, to-wit: 200 cases removed from the warehouse on March 31, 1944, and the 100 cases which defendant denies was in the Haight Street store, then the Court would, in effect, be finding that Mr. Maroosis on March 30 and 31, 1944, re-

moved 700 cases of liquor from the warehouse—400 cases of which he accounted for, 300 cases of which he did not account for, all of which is contrary to the evidence of both the plaintiff and the defendant in this case, since such evidence discloses that only 400 cases were removed. Furthermore, it is quite obvious that the Court's finding that on May 2, 1944, the agents of the Alcohol Tax Unit, took an inventory in the store, which inventory failed to account for the 300 cases is obviously omitting the record of the sales of Three Rivers Whiskey between April 1, 1944, and May 2, 1944, the records of which sales are in Court and in evidence.

III.

Plaintiff objects to defendant's proposed Finding of Fact No. V on the grounds that the evidence established that the 108.98 proof gallons allegedly over-declared by the plaintiff according to the inventory of May 2, 1944, taken by the Alcohol Tax Unit is fully explained by the presence of 60 cases of liquor in the Haight Street store, which 60 cases contains 123.84 proof gallons.

IV.

Plaintiff objects to defendant's proposed Finding of Fact No. VI. on the grounds that said Finding of Fact admits that defendant's entire determination of the assessment and fraud penalty was based upon the defendant's acceptance of the plaintiff's estimated figure of 86 per cent as being the percentage of distilled spirits sales as to gross sales.

Further, that the statement in said Finding "that the said percentage figure of 86 per cent is reasonable" is based on no evidence in this case. That the defendant admits by the very proposed finding containing the above-quoted statement that the figure is not correct but merely states "that it is reasonable." That there is no evidence in the record to establish the reasonableness of the said 86 per cent figure and the evidence in the record establishes the figure of 96.41 per cent as the only accurate figure based on actual audit.

V.

Plaintiff objects to defendant's proposed Finding of Fact No. VII on the ground that said proposed Finding of Fact is contrary to all of the evidence in this case, on the ground that the declaration of the plaintiff was true and correct and there was no intention to conceal or fail to declare any distilled spirits on hand as of April 1, 1944.

VI.

Plaintiff objects to defendant's proposed Conclusion of Law No. 1 on the grounds that there is no evidence to support said Conclusion of Law. That it is not a Conclusion of Law but a Finding of Fact. That it is unique in that the defendant in effect asks this Court to determine that their own physical inventory of May 2, 1944, is "false and incorrect."

VII.

Plaintiff objects to defendant's proposed Conclusion of Law No. II on the ground that the de-

fendant's determination as to the alleged shortage was not reasonable in that it was neither based on audit nor on fact nor on any physical inventory but was arrived at by pure speculation and an arbitrary acceptance of an estimated word of mouth figure from the plaintiff, which subsequently was proven to be incorrect by actual audit. That the defendant was notified of the incorrectness of said estimate but nevertheless proceeded to adopt and use the same solely because by using it an additional assessment could be levied against the plaintiff. That with full knowledge of the existence of another audit by the State Board of Equalization changing that estimate of 86 per cent to 96.41 per cent, the defendant arbitrarily refused to even check by audit, or otherwise, the correctness of the new accurate figure accepted by the plaintiff and communicated to the defendant.

VIII.

Plaintiff objects to defendant's proposed Conclusion of Law No. IV on the ground that there is no evidence in the record sufficient to support such a Conclusion.

Dated: This 21st day of December, 1949.

Respectfully submitted,

MORRIS M. GRUPP,

LEON SCHILLER,

By /s/ LEON SCHILLER,

Attorneys for Plaintiff.

OVERRULED: 2-21-50.

/s/ LLOYD L. BLACK,
U. S. District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 21, 1949.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on November 16, 1949, and on consecutive days thereafter to and including November 19, 1949, at which time the trial was continued to December 1, 1949, for submission. Plaintiff appeared by his counsel Morris M. Grupp, Esq., and Leon Schiller, Esq., and defendant by his attorneys, Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, and C. Elmer Collett, Esq., Assistant United States Attorney, and evidence both oral and documentary having been introduced and the matter having been fully heard, argued, briefed by counsel and submitted, now, therefore, the Court makes the following

Findings of Fact

I.

Plaintiff is a resident of the City and County of San Francisco, State of California, and is engaged in business therein.

II.

Defendant was at all times since May 14, 1945, to the time of the institution of this proceeding the duly appointed, qualified and acting United States Collector of Internal Revenue of the First Internal Revenue Collection District in the State of California, and is a resident of the said Northern District of California, Southern Division.

III.

Plaintiff duly filed his return of floor stocks tax on distilled spirits, malt liquors and wines as of April 1, 1944, as required by the Revenue Act of 1943. That said return included three stores owned by the plaintiff. That Joseph's Liquor Store at 458 Geary Street was one of the three stores. That 1,330.36 proof gallons of distilled spirits of the 1,713.038 declared represented the proof gallonage at the 458 Geary Street store.

IV.

That the tax on the inventories declared was duly paid on July 1, 1944, to Harold A. Berliner, then Collector of Internal Revenue.

V.

That subsequently additional floor stocks taxes in the amount of \$3,744.74 were assessed on plaintiff as of April 1, 1944, upon an alleged under-declaration of the inventory of distilled spirits in the 458 Geary Street store. Also an ad valorem penalty of \$4,733.91 was assessed. Said additional assessment

in the amount of \$8,478.65, together with interest thereon in the amount of \$1,397.74 aggregating a total of \$9,876.39 was paid by plaintiff to defendant in installments between June 15, 1946, and February 2, 1948.

VI.

That plaintiff did take an actual physical inventory of distilled spirits, malt liquors and wines. That said inventory was true and correct and the return duly filed was a true and correct reporting of said inventory.

VII.

The tax due on said inventory, which was duly paid, was the true and correct amount due and owing.

VIII.

That duly authorized agents and representatives of the Alcohol Tax Unit took a physical inventory of the plaintiff's stock in his store at 458 Geary Street, San Francisco, California, as of May 2, 1944, and by adjusting this inventory back to April 1, 1944, their own computation disclosed that the amount declared for distilled spirits by plaintiff exceeded the actual distilled spirits on hand as of April 1, 1944, in the amount of 108.97 proof gallons.

IX.

That 100 cases of Three Rivers Whiskey belonging to Joseph's Liquor Store were stored at 499 Haight Street as of April 1, 1944, and that said 100 cases were included in the inventory declared as

of April 1, 1944, by plaintiff for Joseph's Liquor Store.

X.

That on May 2, 1944, 60 of said 100 cases of Three Rivers Whiskey were still stored at the Haight Street store. That 60 cases of Three Rivers Whiskey represents 123.84 proof gallons of distilled spirits.

XI.

That plaintiff informed Mr. Hedrick, an agent of the Alcohol Tax Unit, that 100 cases of Three Rivers Whiskey belonging to the Geary Street store had been stored in the Haight Street store as of April 1, 1944, and that 60 cases were there on May 2, 1944.

XII.

That the 123.84 proof gallons when added to the inventory of May 2, 1944, taken by the Alcohol Tax Unit and reconciled back to April 1, 1944, substantiates the physical inventory of plaintiff as of April 1, 1944.

XIII.

The defendant admits in Paragraph VI of his Answer and the Court finds that the physical inventory taken by the Alcohol Tax Unit on May 2, 1944, and reconciled back to April 1, 1944, confirmed the plaintiff's inventory.

XIV.

That the defendant completely disregarded the physical inventory taken by plaintiff as of April 1, 1944, and their own physical inventory of May

2, 1944, as reconciled back to April 1, 1944, in making the assessment.

XV.

That defendant admits and the Court finds that the alleged under-declaration was determined as follows:

Inventory of proof gallons of distilled spirits on hand at date of previous filing of Form 758,

Proof Gal.

November 1, 1942..... 631.93

Add:

Distilled Spirits purchases November

1, 1942, to March 31, 1944.....12,944.74

13,576.67

Deduct:

Sales in proof gallons for the period

November 1, 1942, to March 31,

194411,023.46

Computed inventory, April 1, 1944.... 2,553.21

Inventory reported on Form 758 as of

April 1, 1944, for 458 Geary Street

store 1,330.36

Alleged under-declaration..... 1,222.85

The sum of 1,222.85 proof gallons multiplied by \$3.00 per proof gallon equals \$3,668.55. To this figure, the examining officer added \$76.19 for which no explanation was furnished taxpayer, yielding a

tax deficiency of \$3,744.74. To this was added a penalty of 50 per cent of the total tax or an amount of \$4,733.91, resulting in a total assessment of \$8,478.65.

XVI.

The inventory of distilled spirits as of November 1, 1942, was taken from Mr. Maroosis' declaration of distilled spirits filed as of November 1, 1942.

XVII.

The overall sales were taken from the books of Mr. Maroosis and accepted by the Alcohol Tax Unit for the purposes of their calculation.

XVIII.

The actual purchases were confirmed by the Alcohol Tax Unit by examining the invoices in the hands of wholesalers which in turn were confirmed by the books of Mr. Maroosis.

XIX.

The figure of 86 per cent as the percentage of gross sales of distilled spirits to gross overall sales was obtained orally from Mr. Maroosis as his estimate.

XX.

The 86 per cent figure is not substantiated by any audit procedure whatever.

XXI.

It has been stipulated by attorneys for plaintiff and defendant and the Court finds that if 96.41 per cent of the gross sales between July 1, 1943, to

March 31, 1944, were sales of distilled spirits that the alleged under-declaration of 1,222.85 proof gallons would be reduced to a calculated understatement of only 149.56 proof gallons.

XXII.

By stipulation between the parties and the Court finds that if the figure of 96.41 per cent were used in place of the 86 per cent figure for the period July 1, 1943, to March 31, 1944, the calculated inventory would substantiate the taxpayer's April 1, 1944, physical inventory.

XXIII.

The State Board of Equalization of the State of California conducted an audit of plaintiff's books in 1944 in order to determine distilled spirits sales for the period July 1, 1943, to May 25, 1944. In this audit the State Board of Equalization determined that distilled spirits sales were 96.41 per cent of overall sales for said period. The State Board of Equalization determined distilled spirits sales at ceiling prices and a copy of said State Board audit was, prior to the assessment herein referred to, delivered to the Alcohol Tax Unit by the plaintiff and no audit was made by said Alcohol Tax Unit to disprove said State Board of Equalization's audit. Plaintiff prior to the assessment and based upon the said State Board of Equalization audit requested and demanded that his prior oral estimate of 86 per cent as the basis of determining gross distilled spirits sales to overall gross sales be

changed to 96.41 per cent but that said figure was not changed by the Alcohol Tax Unit and that said Alcohol Tax Unit still used the 86 per cent figure to determine the assessment.

XXIV.

That the fraud penalty levied and assessed and collected by the defendant is invalid in that the tax assessment of \$3,744.74 is based on artificial bases and illegal grounds and constitutes no basis for the application of a penalty for fraud; that said penalties for fraud are limited to deficiencies due to fraud with intent to evade the tax; that plaintiff has during all of the times herein referred to denied the existence of any deficiency and questioned the arbitrary assessment and denied the existence of any deficiency for floor tax, denied any fraudulent intent to evade the tax and still so denies the existence of any such fraudulent intent.

XXV.

Plaintiff duly filed his claim for refund of said payment of \$9,876.39. Said claim was made and filed in accordance with the provisions of the law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof and alleged as the basis for said claim the same grounds and facts hereinbefore alleged and herein relied upon.

XXVI.

Said claim for refund was rejected and disallowed in full by the Commissioner of Internal Revenue.

Notice of the rejection and disallowance of said claim for refund was mailed to plaintiff by registered mail by said Commissioner on February 15, 1949.

XXVII.

That no part of said sum of \$9,876.39 erroneously and illegally collected from the plaintiff by defendant, as aforesaid, has been repaid or refunded, and said sum of \$9,876.39, together with interest thereon as provided by law, is due, unpaid and owing to the plaintiff from the defendant.

Conclusions of Law

I.

That defendant's disregard of plaintiff's inventory of April 1, 1944, and of defendant's own physical inventory of May 2, 1944, as reconciled back to April 1, 1944, is improper.

II.

That defendant's assessment based on the figure of 86 per cent of the gross sales being sales of distilled spirits was inaccurate and improper in that it was based upon no audit but upon the taxpayer's estimate given as an "estimate" and accepted as an "estimate" but which estimate was subsequently by actual audit of the State Board of Equalization of the State of California found to be incorrect.

III.

That the failure of the Alcohol Tax Unit to substantiate the 86 per cent figure as accurate overcame

the presumption of the accuracy and propriety of the assessment, which assessment was in turn based upon the 86 per cent figure.

IV.

That the proper figure to have been used by the Alcohol Tax Unit as the percentage of distilled spirits sales as to total gross sales was 96.41 per cent.

V.

That the tax return filed by the plaintiff on May 1, 1944, was true and correct and the assessment of the fraud penalty was unwarranted and improper.

VI.

That plaintiff should have judgment against the defendant for \$9,876.39, plus interest at six (6%) per cent per annum from the date of the payment of the assessment.

Let judgment be entered accordingly.

Done and Dated this day of December, 1949.

.....,

United States District Judge.

Receipt of Copy acknowledged.

Lodged December 21, 1949.

[Endorsed]: Filed February 25, 1950.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on November 16, 1949, and on consecutive days thereafter to and including November 19, 1949, at which time the trial was continued to December 1, 1949, for submission. Plaintiff appeared by his counsel, Morris M. Grupp, Esq., and defendant by his attorneys, Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, and C. Elmer Collett, Esq., Assistant United States Attorney, and evidence both oral and documentary having been introduced and the matter having been fully heard, argued, briefed by counsel and submitted, now, therefore, the Court makes the following

Findings of Fact

I.

This is an action to recover liquor floor taxes and interest against James G. Smyth, the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of the State of California.

II.

Plaintiff is a resident of the City and County of San Francisco, State of California. On May 1, 1944, as required by the Revenue Act of 1943, plaintiff filed a floor stock tax return on distilled spirits, malt liquors and wines for the store known as

Joseph's Liquor Store, 458 Geary Street, San Francisco, California, owned and operated by plaintiff. Said return reported 1330.36 proof gallons of distilled spirits floor stock of said store on April 1, 1944.

III.

On March 31, 1944, 200 cases of Three Rivers Whiskey floor stock of said store at 458 Geary Street were moved by plaintiff from a warehouse to an unknown destination.

IV.

On May 2, 1944, defendant, by his agents, took a physical inventory of the stock of the said store at 458 Geary Street and after determining the sales and purchases of said store for the month of April, 1944, adjusted said inventory back to April 1, 1944. Said inventory as adjusted did not include, nor did it account for the said 200 cases of Three Rivers Whiskey moved from the warehouse on March 31, 1944. Said inventory did not include, nor did it account for 100 cases of Three Rivers Whiskey later claimed by plaintiff to have been located in the basement of a store at 499 Haight Street, San Francisco, California.

V.

That the comparison of the said inventory of May 2, 1944, as adjusted to April 1st, with plaintiff's tax return of May 1, 1944, showed a difference in overdeclaration of distilled spirits by plaintiff of 108.98 proof gallons.

VI.

That neither the inventory taken by defendant on

May 2, 1944, as adjusted to April 1, 1944, nor the inventory taken by plaintiff on April 1, 1944, upon which his tax return of 1330.36 proof gallons was predicated, was true or correct. That plaintiff's said tax return of May 1, 1944, was false and incorrect. That subsequent to May 2, 1944, defendant determined plaintiff's purchases and gross sales of distilled spirits for the period from November 1, 1942, to March 31, 1944, and was informed by plaintiff that the percentage of sales of distilled spirits as to other sales for said period was 86%; that the said percentage figure of 86% was reasonable. Defendant converted the money figure for purchases and gross sales of distilled spirits during said period into proof gallons and determined that plaintiff had failed to declare 1,222.85 proof gallons of distilled spirits in his said tax return of May 1, 1944. The Commissioner of Internal Revenue thereafter levied an assessment on plaintiff.

VII.

That plaintiff knowingly, intentionally, wilfully and deliberately concealed and failed to declare in his said floor tax return filed May 1, 1944, the said 200 cases of whiskey removed from the warehouse on March 31, 1944.

Conclusions of Law

I.

That defendant properly disregarded plaintiff's written inventory of April 1, 1944, and defendant's

inventory of May 2, 1944, as adjusted to April 1, 1944, both said inventories being false and incorrect.

II.

That defendant's determination that plaintiff failed to declare 1,222.85 proof gallons of distilled spirits in his floor tax return on May 1, 1944, was reasonable.

III.

The assessment levied upon plaintiff is presumed to be accurate and proper, and plaintiff has failed to overcome said presumption by adequate evidence.

IV.

The tax return filed by plaintiff on May 1, 1944, was false, fraudulent, and a deliberate suppression of vital facts, and was so made and filed with the intent of evading the tax, and justified the Commissioner of Internal Revenue in levying an assessment upon plaintiff for the fraud penalty.

V.

Plaintiff's complaint should be dismissed and judgment entered for defendant for his costs of suit.

Let judgment be entered accordingly.

Done and Dated This Day of,
19....

.....,

United States District Judge.

Lodged December 16, 1949.

[Endorsed]: Filed February 25, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on November 16, 1949, and on consecutive days thereafter to and including November 19, 1949, at which time the trial was continued to December 1, 1949, for submission. Plaintiff appeared by his counsel, Morris M. Grupp, Esq., and defendant by his attorneys, Frank J. Hennessy, Esq., United State Attorney for the Northern District of California, and C. Elmer Collett, Esq., Assistant United States Attorney, and evidence both oral and documentary having been introduced and the matter having been fully heard, argued, briefed by counsel and submitted, now, therefore, the Court makes the following

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Plaintiff is a resident of the City and County of San Francisco, State of California. On May 1, 1944, as required by the Revenue Act of 1943, plaintiff filed a floor stock tax return on distilled spirits, malt liquors and wines for the store known as

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III.

On March 31, 1944, 200 cases of Three Rivers Whiskey floor stock of said store at 458 Geary Street were moved by plaintiff from a warehouse to an unknown destination.

IV.

On May 2, 1944, defendant, by his agents, took a physical inventory of the stock of the said store at 458 Geary Street and after determining the sales and purchases of said store for the month of April, 1944, adjusted said inventory back to April 1, 1944. Said inventory as adjusted did not include, nor did it account for the said 200 cases of Three Rivers Whiskey moved from the warehouse on March 31, 1944. Said inventory did not include, nor did it account for 100 cases of Three Rivers Whiskey later claimed by plaintiff to have been located in the basement of a store at 499 Haight Street, San Francisco, California.

V.

That the comparison of the said inventory of May 2, 1944, as adjusted to April 1st, with plaintiff's tax return of May 1, 1944, showed a difference in over-declaration of distilled spirits by plaintiff of 108.98 proof gallons.

VI.

That neither the inventory taken by defendant on May 2, 1944, as adjusted to April 1, 1944, nor the inventory taken by plaintiff on April 1, 1944, upon which his tax return of 1330.36 proof gallons was predicated, was true or correct. That plaintiff's said tax return of May 1, 1944, was false and incorrect. That subsequent to May 2, 1944, defendant determined plaintiff's purchases and gross sales of distilled spirits for the period from November 1, 1942, to March 31, 1944, and was informed by plaintiff that the percentage of sales of distilled spirits as to other sales for said period was 86%; that use by defendant of said percentage figure of 86% under the circumstances was reasonable and was more favorable to plaintiff than would have been the use of 66% which was the percentage originally suggested by plaintiff as correct. Defendant converted the money figure for purchases and gross sales of distilled spirits during said period into proof gallons and determined that plaintiff had failed to declare 1,222.85 proof gallons of distilled spirits in his said tax return of May 1, 1944. That such method was the most reasonable and rational one available to defendant under the circumstances, especially since because of the knowledge defendant's agent had of the diversion of said 200 cases of whiskey mentioned in Finding of Fact III hereof defendant could have no confidence in any report by plaintiff. The Commissioner of Internal Revenue thereafter levied an assessment on plaintiff.

VII.

That plaintiff knowingly, intentionally, wilfully and deliberately concealed and failed to declare in his said floor tax return filed May 1, 1944, the said 200 cases of whiskey removed from the warehouse on March 31, 1944.

Conclusions of Law

I.

That defendant properly disregarded plaintiff's written inventory of April 1, 1944, and defendant's inventory of May 2, 1944, as adjusted to April 1, 1944, both said inventories being false and incorrect.

II.

That defendant's determination that plaintiff failed to declare 1,222.85 proof gallons of distilled spirits in his floor tax return on May 1, 1944, was reasonable.

III.

The assessment levied upon plaintiff is presumed to be accurate and proper, and plaintiff has failed to overcome said presumption by adequate evidence.

IV.

The tax return filed by plaintiff on May 1, 1944, was false, fraudulent, and a deliberate suppression of vital facts, and was so made and filed with the intent of evading the tax, and justified the Commissioner of Internal Revenue in levying an assessment upon plaintiff for the fraud penalty.

V.

Plaintiff's complaint should be dismissed and judgment entered for defendant for his costs of suit.

Let judgment be entered accordingly.

Done and Dated This 21st day of February, 1950.

/s/ LLOYD L. BLACK,

United States District Judge.

[Endorsed]: Filed February 25, 1950.

[Title of District Court and Cause.]

ORDER OVERRULING PLAINTIFF'S OBJEC-
TIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW MADE AND
ENTERED BY THE COURT

Whereas the Findings of Fact and Conclusions of Law as made by the Court are the same as those proposed by defendant except that Finding numbered VI as made by the Court contained additional language to that proposed by defendant; and

Whereas plaintiff desires its objections entitled "Plaintiff's Objections to Defendant's Findings of Fact and Conclusions of Law" as filed in this cause on December 21, 1949, to likewise apply to the Findings of Fact and Conclusions of Law as signed by the Court, and

Whereas plaintiff has objected to the additional language set forth in Finding numbered VI as

signed by the Court, such objections being as follows:

“Relative to the revised Finding No. VI our objections thereto are, of course, still the fundamental objections heretofore made. We note particularly the Court’s statement ‘That such method was the most reasonable and rational one available to defendant under the circumstances, especially since because of the knowledge defendant’s agent had of the diversion of said 200 cases of whiskey mentioned in Finding of Fact III hereof defendant could have no confidence in any report by plaintiff.’ We feel that this language is not supported by the evidence in this case, since the evidence, according to the partial transcript in our possession relative to the movement of the liquor referred to, did not disclose that any whiskey was ever observed in that truck. Furthermore by actual mathematical calculations heretofore supplied in plaintiff’s memorandum all the whiskey removed from the warehouse was fully accounted for, including the 200 cases referred to in the proposed Finding.

“We cannot agree with the Finding that the 86 per cent ‘estimate’ supplied by Mr. Maroosis was a reasonable ‘estimate.’ We cannot help but point out that the Department of Internal Revenue could just as well have accepted his 66 per cent ‘estimate’ which would have increased the tax beyond all reason and proportion. We do not feel that a taxpayer’s ‘estimate’ is a sufficient basis for any assessment where actual figures are available. We cannot

feel that that is reasonable in the face of actual figures of the State Board of Equalization which have never been attacked by the defendant nor have the calculations or method of calculation used to arrive at the State Board of Equalization's figure ever been questioned."

And Whereas the Court deems that such additional portions of Finding numbered VI so objected to by letter dated February 20, 1950, of counsel for plaintiff are actually supported by the evidence and deems that under the evidence the method and percentage figure used by plaintiff under the circumstances disclosed by the evidence are reasonable; and Whereas the Court further deems each and all of the objections of plaintiff to be without merit,

Now Therefore, said objections, and each of them, are overruled.

Dated February 21, 1950.

/s/ LLOYD L. BLACK,

United States District Judge.

[Endorsed]: Filed February 25, 1950.

In the United States District Court for the Northern District of California, Southern Division

No. 28965-R

NICK W. MAROOSIS,

Plaintiff,

vs.

JAMES G. SMYTH, United States Collector of Internal Revenue for the First Collection District of California,

Defendant.

JUDGMENT

This cause came on regularly for trial on November 16, 1949, and on consecutive days thereafter to and including November 19, 1949, at which time the trial was continued to December 1, 1949, Judge Lloyd L. Black presiding, sitting without a jury. The plaintiff was present in person and represented by his counsel, Morris M. Grupp, Esq., and defendant was represented by his attorneys, Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, and C. Elmer Collett, Esq., Assistant United States Attorney.

Thereupon, oral and documentary evidence was introduced by and on behalf of each of the parties hereto and at the close of all of the evidence oral and written arguments were made by counsel for the respective parties, and the cause was thereupon taken under advisement, and thereafter the Court, being fully advised in the premises, made and signed and ordered filed herein its Findings of Fact and

Conclusions of Law, which are by reference made a part hereof.

Wherefore, by reason of the law and the evidence and the premises and the Findings of Fact and Conclusions of Law, as aforesaid,

It Is Ordered and Adjudged that plaintiff take nothing from the defendant, and that plaintiff's complaint herein be, and the same is hereby dismissed.

It Is Further Ordered, Adjudged and Decreed that defendant recover costs in the amount of \$.00.

Done and Dated This 21st day of February, 1950.

/s/ LLOYD L. BLACK,

United States District Judge.

Lodged December 22, 1949.

[Endorsed]: Filed February 25, 1950.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS
AND DISBURSEMENTS

Marshal's fees	\$
Clerk's fees	
Reporter's fees	
Docket fee	20.00
Examiner's fees	
Witness fees	
Portion of Transcript.....	12.10

United States of America,
Northern District of California—ss.

C. E. Collett being duly sworn, deposes and says: That he is the Assistant United States Attorney in charge of this case in the above-entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements; that the items in the above memorandum contained are correct; that the said disbursements have been necessarily incurred in the said cause; and that the services charged therein have been actually and necessarily performed as therein stated.

/s/ C. E. COLLETT.

Subscribed and sworn to before me this 27th day of February, A.D. 1950.

[Seal] /s/ MARGARET P. BLAIR,
Deputy Clerk, United States District Court, Northern District of California.

To: Plaintiff above-named and to Messrs. Grupp & Schiller, his attorneys, 961 Mills Building, San Francisco, Calif. (4)

You will please take notice that on Thursday, the 3rd day of March, A.D. 1950, at the hour of 2:00 o'clock p.m., the undersigned will apply to the clerk of said Court, to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said Court, in such case made and provided.

/s/ C. E. COLLETT,
Asst. U. S. Attorney,
Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 27, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that the plaintiff in the above-entitled action hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered on the 27th day of February, 1950, in favor of the defendant herein.

Dated: This 23d day of March, 1950.

/s/ MORRIS M. GRUPP,
Attorney for Plaintiff.

[Endorsed]: Filed March 24, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above Named Court:

In accordance with Rule 75(a) of the Federal Rules of Civil Procedure the plaintiff designates the following portion of the record, proceedings and evidence to be contained in the Record on Appeal:

1. Complaint filed on the 22d day of June, 1949.
2. Answer of the Defendant, James G. Smyth, Collector of Internal Revenue for the First Collection District of California, filed on the 18th day of August, 1949.
3. Notice of Motion and Motion for Re-Opening Case filed on the 26th day of November, 1949.
4. Affidavit of David Dellari, filed in support of Motion to Re-Open, filed on the 26th day of November, 1949.
5. Written Stipulation of counsel filed on the 29th day of November, 1949.
6. Order Motion to Re-Open Denied of December 1, 1949.
7. Memorandum and Order of Judgment in favor of Defendant of December 1, 1949.
8. Defendant's Findings of Fact and Conclusions of Law lodged on December 16, 1949.
9. Plaintiff's Findings of Fact and Conclusions of Law lodged on December 21, 1949.
10. Plaintiff's Objections to Defendant's Find-

ings of Fact and Conclusions of Law filed on December 21, 1949.

11. Plaintiff's Proposed Findings of Fact and Conclusions of Law filed on February 25, 1950.

12. Defendant's Proposed Findings of Fact and Conclusions of Law filed February 25, 1950.

13. Findings of Fact and Conclusions of Law of the Court filed February 25, 1950.

14. Order Overruling Plaintiff's Objections to Findings of Fact and Conclusions of Law Made and Entered By The Court filed February 25, 1950.

15. Judgment entered February 27, 1950.

16. Memorandum of Costs and Disbursements filed February 27, 1950.

17. Notice of Appeal to Circuit Court of Appeals filed March 24, 1950.

18. This Designation of Contents of Record on Appeal.

19. All of the original Exhibits introduced by plaintiff and defendant.

20. Entire Reporter's Transcript of the trial.

Dated: This 29th day of March, 1950.

LEON SCHILLER, ESQ.,

MORRIS M. GRUPP, ESQ.,

By /s/ MORRIS M. GRUPP,

Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 30, 1950.

In the Southern Division of the United States District Court for the Northern District of California

No. 28965

NICK W. MAROOSIS,

Plaintiff,

vs.

JAMES G. SMYTH, U. S. Collector of Internal Revenue for the First Collection District of California,

Defendant.

Before: Hon. Lloyd L. Black,
Judge.

REPORTER'S TRANSCRIPT

November 16, 17, 18, 19, 1949

Appearances:

For the Plaintiff:

MORRIS M. GRUPP, ESQ., and
LEON SCHILLER, ESQ.

For the Government:

C. ELMER COLLETT, ESQ.,
Assistant U. S. Attorney.

Morning Session

Wednesday, November 16, 1949 at 9:30 A.M.

The Court: As I understand it, the case of Nick W. Maroosis vs. James G. Smyth is to be tried before me, is that correct, gentlemen?

Mr. Collett: That is correct. However, there are some depositions heretofore taken.

Mr. Grupp: I believe there was some discussion about jury trial, as to whether we were entitled to it. I think we were, but we have decided to waive it.

The Court: All right, both sides agree to try it before the court without a jury?

Mr. Grupp: That is right. We have written stipulation which has been prepared and I have handed counsel, and we will sign that.

Mr. Collett: I am signing this stipulation, but it is understood the government does not concede you have any right to jury trial in the first place. It is dated November 8.

The Court: All right, you may proceed.

Mr. Grupp: Would your Honor like me to make an opening statement?

The Court: You may make an opening statement if you think it will be helpful to the Court.

(Opening Statement and colloquy between counsel omitted.)

The Court: As I understand it, at least one vital difference [2*] between the claimant and the collector, or the plaintiff and the defendant, is whether

* Page numbering appearing at top of page of original certified Transcript of Record.

the figure of approximately 96 per cent or the figure of approximately 86 per cent is used as the percentage of sales of distilled spirits to the total sales of this store on Geary Street.

Mr. Grupp: That is correct.

The Court: I have carefully refrained from saying that the only difference between—I will refrain saying such is the vital difference. I said it is a vital difference. It is now 12:00 o'clock. I think I should do this with you gentlemen: I think I should continue this matter until 2:15. I have an announcement of a decision to make at 2:00 o'clock that will take at least 15 minutes. In the meantime, if you gentlemen can get together on a stipulation enough so that when it is announced to me it is a firm stipulation, I would be interested in that; but I am not interested in negotiations for stipulation which are repudiated, because at least I am confused.

Mr. Collett: I think we can do that, your Honor.

The Court: All right, you are excused.

(Thereupon an adjournment was taken until 2:15 p.m. this date.) [3]

Afternoon Session

Wednesday, November 16, 1949 at 2:15 P.M.

The Court: You may proceed.

Mr. Grupp: Counsel and I did agree on some figures. It is stipulated that the opening inventory of this particular store as of November 1, 1942, may be deemed to be 631.93 proof gallons of distilled spirits.

The Court: That is November 1, 1942?

Mr. Grupp: That the total purchase of this store of distilled spirits for the period between November 1, 1942, to March 31, 1944, is \$203,208.51; that the gross sales, including sales tax and including sales of distilled and non-distilled spirits is \$276,328.51; that the sales tax included in that gross figure is the amount of \$7,041.25; that the net sales therefore, were \$269,287.26.

The Court: Is that so stipulated?

Mr. Collett: So stipulated.

The Court: Those are firm stipulations?

Mr. Grupp: That is right.

NICK W. MAROOSIS

the plaintiff herein, called as a witness on his own behalf, sworn.

The Clerk: Please state your name to the Court.

A. Nick W. Maroosis. [4]

Direct Examination

By Mr. Grupp:

Q. You are of course the plaintiff in this action, are you not? A. Yes, sir.

Q. Also known as N. W. Maroosis?

A. Yes, sir.

Q. Mr. Maroosis, what is your business at the present time?

A. The retail package store business, the liquor business, in both forms of the liquor business.

Q. And in 1942 to 1944, inclusive, what business were you in?

(Testimony of Nick W. Maroosis.)

A. In the liquor business, retail package business.

The Court: Are you in the wholesale now?

A. No.

The Court: You are in the package and retail?

A. I am in the retail package and the off-sale—or on-sale spirits.

Q. (By Mr. Grupp): In 1944 you were only in the retail package business, I understand.

A. That is correct.

Q. Between the dates of November, 1942, and April 1, 1944, how many liquor package stores did you have? A. Three.

Q. Where were they located?

A. 499 Haight Street, 2066 Fillmore, 458 Geary Street.

The Court: Three business places, and where were they [5] again?

A. 499 Haight Street, 2066 Fillmore, and 458 Geary.

Q. (By Mr. Grupp): With reference to the 458 Geary Street, Mr. Maroosis, prior to your taking that store over some time in 1944, who were the owners of that establishment?

A. Mr. Mike Kosloff and myself.

Q. You were partners then? A. Yes.

The Court: That was for all three stores?

A. No, only 458 Geary.

Q. (By Mr. Grupp): What was the name of that store? A. Joseph's.

(Testimony of Nick W. Maroosis.)

Q. Joseph's Liquor Store?

The Court: That would be for what date?

A. Before April 1, before the—would you repeat your question?

Q. (By Mr. Grupp): My question related to the dates when you took physical possession yourself of the Geary Street store, that is, Joseph's.

Q. Myself, without a partner? I took physical possession on April 1, 1944.

Q. Prior to that date you advertised, did you, the operation of that store as a liquor store business?

A. Yes, sir.

Q. I show you what purports—it is from the Daily Commercial News, I believe it is. [6]

A. It was in the Examiner, I believe. No, I take it back, it says here the Daily Commercial News. It seems to me it was printed in the Examiner.

Q. You published at that time, however, this certificate of individual doing business under a fictitious name? A. Yes.

Mr. Grupp: Might I offer this as plaintiff's exhibit 1?

The Court: Any objection?

Mr. Collett: No objection.

(Thereupon certificate referred to was received in evidence and marked plaintiff's exhibit No. 1.)

The Court: Exhibit 1 is admitted, there being no objection. Let me see it please.

(Testimony of Nick W. Maroosis.)

Q. (By Mr. Grupp): Now, Mr. Maroosis, I believe this refers to the date March 13 as the consummation of your transaction with Mr. Kosloff and taking over that store. A. Yes.

Q. Did you actually take physical possession of that store on March 13? A. No.

Q. When did you take physical possession of the store? A. April 1, 1944.

Q. Mr. Maroosis, what were the names under which you operated the Haight Street and Fillmore stores? A. Bi-Rite.

Q. The Bi-Rite Stores were those two individual operations? A. Yes, sir.

Q. Nobody had any interest in it other than yourself? A. No, sir.

Q. Mr. Kosloff was only a partner in the Joseph's? A. Yes, sir.

Q. On the 1st day of April, 1944, were you—or prior to that time, did you at any time take a physical inventory immediately prior to the 1st of April, 1944 of the liquor, distilled spirits, and other inventory in Joseph's, 458 Geary?

A. Yes, we did.

Q. You say "we did." Just explain who did to the Court.

A. Well, I don't know. I would have to see the copy.

Q. Now, Mr. Maroosis, handing you this book which contains some typewritten sheets and also some sheets on which there are penciled listings, I ask you what that document is.

(Testimony of Nick W. Maroosis.)

A. It is the inventory taken on the 31st of March, 1944.

Q. Of what store? A. 458 Geary Street.

Q. Can you by examining that inventory tell us who took that inventory? What I am particularly interested in, Mr. Maroosis, were you there? I don't find anything there that shows you were there when that inventory was taken. I am not interested in the others unless counsel is.

A. Yes, I was there. I would say there were four people that [8] I identified the handwriting other than myself. There is some handwriting apparently belongs, I would say, to Vernon Jones, who was our manager at the Haight and Fillmore stores; and I would also say there is handwriting there that possibly, or more than likely, belongs to Mr.—belongs to Mrs. Vera Kosloff and myself.

Q. Now, Mr. Maroosis, will you explain to the court how that inventory was taken?

A. Well, it is a very simple procedure. You start at one point in the store and go around and count the bottles. One party counts the bottles and another writes it down and checks them.

Q. Does that inventory contain every item that was in the store on the 31st day of March, 1944?

A. This inventory, the original doesn't. The original—you are asking me two different questions. The original would contain everything that was in the store on the 31st of March?

Q. Yes.

(Testimony of Nick W. Maroosis.)

A. Is that what you want me to answer?

Q. I don't quite understand your previous answer.

A. Let me explain it like this: The original procedure, the copy is the same as this copy here with the exception of in most instances you will find in a liquor store where you will have one particular type of whiskey or wine in the window you will have some of the particular type or same type on the shelf for display, you will have still some more for sale and you will [9] have still more in your warehouse and still have some more on the warehouse shelf. What that means, you might have five—in regard to the particular items for five dates, the penciled copy, but in the recap you will only check it for anything—the penciled copy is 37 pages and the recap only 17.

Q. What I am trying to ascertain is whether the penciled copies show the actual notations of inventory taken as it was taken. A. Yes.

Q. Does that contain every item of liquor that was in this store? A. Yes, sir.

Q. Were there any items of stock that were not taken in that inventory?

A. The July 2nd item, 100 cases of Three Rivers.
The Court: 100 cases in the inventory?

A. There is 100 cases in the recap, but is not in the inventory because it wasn't in the store.

Mr. Grupp: Let's look at that inventory with reference to the—strike that, please. Incidentally,

(Testimony of Nick W. Maroosis.)

you had identified, I believe, in answer to my questions, this document as an inventory and as a recap? A. Yes, it is a recap of the inventory.

Q. How could we tell the difference by just looking at it? Which is the inventory and which the recap, as you look at it?

A. It is quite obvious. The inventory only shows the number of items and the retail sales price to distinguish it, because [10] on the forms, that is, you have—for example, you have some champagne, you have one of a 1933 vintage which will be \$5 and one of 1937 vintage——

Q. I don't think you understood my question.

A. I am trying to show the reason for putting the retail price——

Q. Will you listen to the question? In other words, the inventory statement is a penciled statement? A. Yes.

Q. And the recap typed out? A. Yes.

Q. Then we can say whatever is typed is the recap? A. Yes.

Q. Now, looking at the penciled notations, will you refer to page 33? You examined that part during the lunch hour? A. Yes.

Q. I will ask you if on page 33 you have noted any entries of Three Rivers?

A. Two fifths. Two only fifths.

Q. Will you look at page 36?

A. That is two bottles. I had one notation, 163 cases of Three Rivers on page 36.

(Testimony of Nick W. Maroosis.)

Q. How many bottles?

A. Two only bottles of Three Rivers.

Q. Am I correct that 163 cases means 1956 bottles? A. Multiply by 12. [11]

Q. Will you look at page 37.

A. 1956 bottles. Page 37, eight cases of Three Rivers.

Q. That means 96 bottles? A. Yes.

Q. Aside from those entries which I called to your attention, those four entries, on page 33, two entries on page 36, and one on page 37 in your penciled inventory, is there any other reference to Three Rivers? A. No.

Q. I think that means 2,056 bottles? Yes, that is right, as presented in the penciled inventory. Now, Mr. Maroosis, at this point I would like for you to refer to page 10, I believe it is, on your recap of the inventory which you have before you.

A. Yes.

Q. Do you note any reference in that page 10 of the recap to Three Rivers?

A. Yes, 3256 fifths Three Rivers whiskey.

Q. 3256 fifths? The entries in the penciled notes were 2056 bottles. Your recap shows 3256 bottles, is that correct? A. Correct.

Q. That is a difference of 1200 bottles. How many cases is that? A. 100 cases.

Q. At this point, Mr. Maroosis, I hand you two separate documents, one in pencil and one in typing, and ask you what those documents are. [12]

(Testimony of Nick W. Maroosis.)

A. This is the same thing, only for the Haight Street.

Q. When was this inventory taken of the Haight Street store? A. Same night.

The Court: Counsel, we are going to have a lot of difficulty with exhibits, and I would suggest that before a witness is ever handed an exhibit you have that marked as an exhibit for identification.

Mr. Grupp: I will.

The Court: Then *if is* referred to the witness, refer to that exhibit for identification, and if you say any page, refer to that, so we will know. Right now I know what he has been talking about, that he has been talking about a certain document, but long before this case is over I will have forgotten which document he was speaking of first.

Mr. Grupp: Might I at this time offer, your Honor, the inventory and recap of the 458 Geary Street?

The Court: Have it marked and then hand it to him and ask him if that is the document he has been talking about.

Mr. Grupp: All right.

(Thereupon inventory and recap of 458 Geary Street store were marked plaintiff's exhibit 2 for identification.)

The Court: That is a combination of the penciled inventory and typed recap, is that correct?

Mr. Grupp: That is correct.

A. Correct. [13]

(Testimony of Nick W. Maroosis.)

The Court: For Geary Street?

A. Yes.

The Court: Now you may hand this to the witness.

Q. (By Mr. Grupp:) Mr. Maroosis, I am handing you plaintiff's exhibit 2 for identification.

A. This is the recap and penciled copy of the inventory of the 458 Geary Street store for March 31, 1944.

Q. The questions which I asked you relate to Three Rivers and now refer to this inventory and see whether or not this testimony referred to this plaintiff's exhibit 2 for identification.

A. Specifically.

The Court: Now if you wish you may offer the exhibit.

Mr. Grupp: I do offer it in evidence.

Mr. Collett: Let me see. He has identified something there?

The Court: I am not anxious that you do that now. He has offered it. Do you wish time to consider it? I am satisfied with this now. I will not rule on it. You may have your time. I am only suggesting before this witness is handed any other documents they first be marked. This one for Haight Street, apparently, should be exhibit 3 for identification. Later I will have less difficulty than I will otherwise.

Mr. Grupp: The Haight Street is—well, I offer

(Testimony of Nick W. Maroosis.)

the penciled sheets as plaintiff's exhibit for identification next in order. [14]

The Clerk: Plaintiff's exhibit No. 3 for identification.

Mr. Grupp: And the book with the typed sheets as plaintiff's exhibit for identification No. 4.

(Whereupon penciled sheets and book with typed sheets were marked plaintiff's exhibits No. 3 and 4, respectively, for identification.)

Mr. Collett: I understand you are offering this in evidence?

The Court: I am giving you time to make your objection.

Mr. Collett: If the Court please, on voir dire I wonder if I might ask a couple of questions with respect to this particular document?

The Court: Surely.

Q. (By Mr. Collett): Mr. Maroosis, the inventory that is represented by plaintiff's exhibit 2, is this the inventory that was filed with the government on your return?

A. Is that the inventory that was filed with the government? I don't understand the question.

Q. You submitted an inventory as of March 31 in accordance with the provisions of the Revenue Act which required you to file an inventory and return on the distilled spirits you had on the floor in the Geary Street store as of April 1.

Mr. Grupp: That assumption is not so. The

(Testimony of Nick W. Maroosis.)

1943 Act did not require filing an inventory, merely a return.

Q. (By Mr. Collett): What I want to know, is this an inventory [15] filed with that return?

A. That is the inventory on which I filed on.

Q. This is the inventory on which you filed? And the difference between the penciled notes and the typewritten portion of it is nothing more than a recapitulation. Any group of it, the individual items, in pencil, they might have represented a sale of two bottles of Three Rivers, two bottles or three cases——

A. That is right.

Q. You collected them into this, into the sales portion, is that correct?

A. That is right.

Mr. Collett: No objection.

The Court: Exhibit 2 is offered. No objection. It is admitted.

(Whereupon document heretofore marked plaintiff's No. 2 for identification was received in evidence.)

Q. (By Mr. Grupp): Mr. Maroosis, I am handing you plaintiff's exhibit for identification No. 3 and ask you what that document is.

A. It is a penciled copy of the inventory at 499 Haight, March 31, 1944.

Q. Is that the original inventory taken?

A. Yes, sir.

Q. Who took that inventory?

A. This looks like it was taken by—looks like my sister was [16] one of them, my wife another.

(Testimony of Nick W. Maroosis.)

There is a foreign hand here, I can't exactly put my finger on. It was apparently by three people, however.

Q. Were you present when that was taken?

A. Yes sir.

Q. Does that inventory reflect the exact items that were in the Haight Street store on the date it purports to represent, March 31, 1944?

A. That is correct.

Q. I will ask you if on the penciled—on plaintiff's exhibit 3 for identification there are 100 cases of Three Rivers? A. Yes.

Q. Do you know what page that is?

A. For some reason or other these pages were not numbered.

Q. Well, it is the third page from the back, is that correct? A. Yes.

Q. What is the notation there?

A. It is 100 cases of Three Rivers at \$3.76, checked.

Q. Now, Mr. Maroosis, I hand you plaintiff's exhibit 4 for identification and ask you what that is?

A. That is the recap of the inventory I just returned to you.

Q. That is the recap for the Haight Street store, plaintiff's exhibit 3 for identification?

A. Yes.

Q. And I will ask you if you have examined plaintiff's exhibit [17] 3 for identification?

(Testimony of Nick W. Maroosis.)

A. Yes.

Q. And I will ask you if you have examined plaintiff's exhibit 4 for identification?

A. Yes.

Q. Is there in that recap any reference to the hundred cases of Three Rivers which was on the penciled inventory, plaintiff's exhibit 3 for identification.

A. No. That was left out of the inventory because it didn't belong in this store.

Q. Left out of the recap?

A. Left out of the recap. It was checked with the recap of the 458 Geary Street.

Q. Let me see if I understand. The penciled inventory on plaintiff's exhibit 2 for identification——

A. Is for 100 cases.

Q. For 100 cases?

A. And the recap is over 100 cases. The merchandise——

Q. Just a minute, you say the recap is over?

A. It is over because it has none, consequently it was over 100 cases.

Q. By reason of their inclusion on plaintiff's exhibit 3?

A. That is correct.

Q. That was eliminated on the recap for the Haight Street store, included in the recap on Geary store? [18]

A. Yes, and that was also paid out of Geary, who belonged to the merchandise.

Q. Will you explain, Mr. Maroosis, why this 100 cases of Three Rivers was at Haight Street?

(Testimony of Nick W. Maroosis.)

A. We didn't have any room for it at Geary.

Q. When was it moved from the warehouse?

A. I think on the 29th.

Q. Of what?

A. Of March. However, it is—there is an indication in this remark that it was on the 30th.

Q. In any event, before April 1, 1944, there was Three Rivers, how many cases removed from the warehouse

A. I thought it was 350. I believe it is 400 cases from what I am told.

Q. These 400 cases were moved out of the warehouse—

A. San Francisco Warehouse.

Q. —on the 30th and 31st of March?

A. Yes.

Q. Where were those 400 cases put?

A. They were put into the Geary Street store, and the balance of 100 cases put in the Haight Street, 499 Haight, because we didn't have room for them at Geary Street.

Q. When your floor stock tax declaration was filed—incidentally, might I at this time—strike that question.

Mr. Grupp: I offer in evidence plaintiff's exhibit 3 and [19] 4 for identification.

The Court: Exhibits 3 and 4 for identification offered in evidence.

Mr. Collett: If I might ask the Court. the witness identified one page of this penciled inventory for 499 Haight Street as the third from the back.

(Testimony of Nick W. Maroosis.)

I wonder if we might designate it by some other means so the Court won't have to be referring to the "third from the back for identification."

The Court: How many pages are there?

A. Just a few.

Mr. Grupp: Might we number the pages?

The Court: Is there any reason why they shouldn't be numbered now, starting in at the first page?

Mr. Grupp: I find it is on page 9. I number all pages down to 11 pages.

The Court: There are 11 pages in exhibit 3 for identification?

Mr. Grupp: That is correct.

The Court: That is, exhibit 3 for identification has been numbered by plaintiff's counsel today as of 11 pages, and the page heretofore referred to as "third from the end" is numbered page 9, is that right?

Mr. Grupp: That is correct.

The Court: You may proceed.

Mr. Grupp: We offer that in evidence at this time. [20]

The Court: Exhibit 3 for identification is offered. Any objection?

Mr. Collett: No objection.

The Court: Exhibit 3 admitted.

(Whereupon penciled copy of inventory, 499 Haight St., March 31, 1944, was marked plaintiff's exhibit 3 in evidence.)

(Testimony of Nick W. Maroosis.)

Mr. Grupp: Plaintiff's exhibit 4 for identification is now offered in evidence as plaintiff's exhibit next in order.

The Court: Any objection?

Mr. Collett: No objection.

The Court: Admitted.

(Whereupon recap of plaintiff's exhibit 3 offered and received as plaintiff's exhibit 4 in evidence.)

Mr. Collett: That is the recap?

The Court: Yes, 4 is the recap of 3.

Mr. Grupp: Do you have the original, counsel, of the return filed by Mr. Maroosis?

The Court: Counsel, this case is taking up more time than I had expected that it is my suggestion we work until 5:00 o'clock. Is that satisfactory to counsel?

(Colloquy between counsel omitted.)

Mr. Grupp: I have asked counsel if he has the original of these returns which consist of three pages. May I offer it as plaintiff's exhibit 5?

Mr. Collett: We will stipulate it if you want it introduced in evidence.

Mr. Grupp: All right, may it go in evidence by stipulation?

Mr. Collett: No objection.

The Court: What has been marked as plaintiff's exhibit 5 for identification it is stipulated may be admitted in evidence as what?

(Testimony of Nick W. Maroosis.)

Mr. Grupp: As plaintiff's exhibit 5.

The Court: Exhibit 5 admitted by stipulation. What does it represent?

Mr. Grupp: It represents the copy of the tax return of Mr. Maroosis as of the 1st day of April, 1944.

The Court: For the Geary Street store?

The Court: This is for all three stores.

(Whereupon tax return of 4/1/44 was received in evidence and marked plaintiff's exhibit 5.)

Mr. Grupp: I think since it has been admitted into evidence I would merely like to point out that this first page represents the quantities of distilled property held, the tax rate and the amount of tax paid, showing it was \$2,749.75 paid. That has a stamp marked from the Treasury Department. It isn't quite legible. The second page is amended. It is an identical form as the first page that it has a stamp marked "Amended," shows recieved by the Department of Internal Revenue May 1, 1944. Correct? [22]

Mr. Collett: Yes.

Mr. Grupp: This refers to the three stores and shows an additional amended return of 1000 proof gallons of distilled spirits, the rate of tax, and shows additional tax paid \$3000. Attached to that amended return is a notation referring to N. W. Maroosis, 2066 Fillmore, 499 Haight, 458 Geary. Due to adding machine only carrying six figures,

(Testimony of Nick W. Maroosis.)

the seventh figure was omitted. Original file was 713.038, should be 1713.038, the difference being of exactly 1000 which is the omission of the seventh line by adding machine tape.

Q. (By Mr. Grupp): Mr. Maroosis, these taxes referred to in plaintiff's exhibit 5 and these returns were by you filed on the same day, were they not? A. To the best of my knowledge.

Q. Those penciled notations, were they in your handwriting? A. Yes, it is.

Q. That was attached to the amended return when you filed it? A. Yes, sir.

Q. When did you note that error or omission of the 1000 from the figure on your original return?

A. To the best of my knowledge it was late that afternoon, same afternoon, although I am not too positive about it.

Q. You then immediately filed as an amended return showing the 1000 gallons and paid taxes on it? A. Yes, sir. [23]

Q. Now. Mr. Maroosis, calling your attention to the 2nd day of May—incidentally, did I understand correctly, plaintiff's exhibit 5, in evidence, being that tax return and the amendment thereto was a complete return of all distilled spirits held in the three stores then owned and operated by you in San Francisco? A. That is correct.

Q. And included the 100 cases of Three Rivers?

A. That is correct.

Q. Incidentally, was your store on Geary Street open on the 1st of May. A. No.

(Testimony of Nick W. Maroosis.)

Q. Was your store on Geary Street open on the 2nd of May? A. No.

Q. When did it—how long was it closed?

A. Two days.

Q. Was it April or May?

A. April 1st it was closed and April 2nd it was closed. We opened the 3rd of May—the 3rd of April, excuse me.

Q. In other words, immediately after this floor stock tax was taken the store remained closed two days? A. That is correct.

Mr. Collett: Let me understand you, I heard you say the 1st or 2nd of May?

Mr. Grupp: April 1st.

The Court: It wasn't closed May 1st? [24]

A. No.

Q. (By Mr. Grupp): Was there any special purpose in keeping it closed at that time?

A. No, just to readjust stock and compile figures and such as that. There is a lot of work to taking an inventory, considerable work. To the best of my knowledge it shouldn't have been closed two days, should have been one; but if I recall correctly, April 1st or April 2nd may have fallen on Sunday, and if it did that would be a reason for the two day closing. Really only should be closed one day, but I think if the calender is checked you will find one of those two days would be a Sunday.

Q. Mr. Maroosis, you then had 30 days within which to file this return, and you filed it on May 1st?

(Testimony of Nick W. Maroosis.)

A. Yes, sir. Prior to May 1st. The day prior.

Q. Was that mailed?

A. It was taken in both instances, I believe, to their office, the Office of the Collector of Internal Revenue on McAllister Street.

Q. Their stamp return shows the 1st of May, I notice.

Q. There were so many people filed that last day, lots of times they don't get to it until the following day.

Q. In any event, calling your attention to the 2nd day of May, 1944, at that time did you see any of the men from the Alcohol Tax Unit?

A. Well, it comes back to that Sunday again. I don't remember [25] whether it was the 2nd or 3rd I saw Mr. Hedrick.

Q. 2nd of May?

A. Was it? It is either the 2nd, 3rd or 4th Mr. Hedrick was there.

Q. But in the early part of May Mr. Hedrick came to the store at 458 Geary? A. Yes.

Q. Did he have three or four men with him—did you have a conversation with Mr. Hedrick at that time? A. Yes.

Q. In the presence of these other men?

A. Yes.

Q. In the store? A. Yes.

Q. Will you tell us what was said at that time by you and Mr. Hedrick?

A. Mr. Hedrick came in and he said—

(Testimony of Nick W. Maroosis.)

Mr. Collett: I am going to ask counsel to fix the date.

Q. (By Mr. Grupp): Mr. Maroosis, can you tell us the exact date?

A. I cannot tell you the exact date, no, because I don't remember.

Q. Approximately?

A. It was either the 2nd, 3rd or 4th.

Q. Of what month? [26]

A. Of May 1944.

Q. And that was in the Geary Street store?

A. Yes.

Q. Will you tell us what conversation was had?

A. It was about 10:00 o'clock in the morning, somewhere around that time, we opened the store. Mr. Hedrick was standing in the doorway waiting with three or four men. As we came in he brushed by and said, "We are going to take inventory," and they distributed, or Mr. Hedrick distributed the boys at various places and they started to take inventory. I said, "Why don't you take my copy and check the inventory with my copy? I think you will find it much more rapid and correct, if not more correct." Then the conversation between me and Mr. Hedrick was just irrelevant.

Q. Well, didn't it have anything to do with the floor tax?

A. Nothing to do with the floor tax.

Q. Did they take an inventory there, to the best of your knowledge? A. Yes, sir.

(Testimony of Nick W. Maroosis.)

Q. How long were they in the store?

A. I don't remember. I had to leave.

Q. You left then?

A. Yes. I don't remember exactly when.

Q. Did you subsequently have any conversation with Mr. Hedrick with reference to this inventory?

A. Subsequently? Yes, as a matter of fact it was on that same day he took the inventory, or the following day it seems to me that Mr. Hedrick came in and asked me for my copy of the inventory.

Q. Did you give it to him?

A. Yes, I gave it to him.

Q. Did he remove that copy from your premises?

A. Yes, he did, and he had it for several days. I can set the exact date if I can have one of the exhibits there, the exhibit numbered 2, I believe. He had it from May 2nd until May 4th, I believe, 1944—May 4th, 1944, until October 2nd.

Q. Of the same year?

A. Yes. He had it all of May, all of June, July, August, September, and brought it back on October 2nd.

Mr. Collett: For the purpose of clarification, if your Honor please, the witness has in his hand plaintiff's exhibit 2, is that correct?

A. Yes, sir.

Mr. Collett: You referred to the inventory. Do you mean plaintiff's exhibit 2, or a portion of it, or all of it? I will object to the question, being not clear.

(Testimony of Nick W. Maroosis.)

A. There is only one inventory.

Mr. Collett: There is a recap and a lot of penciled notations there. What do you refer to?

A. There isn't a penciled notation there. A pencil inventory [28] and recap. They are identically the same and can be checked as such.

Mr. Collett: Then as I understand it, you state you gave him the entire matter that is contained in Plaintiff's exhibit 2?

A. Yes, sir.

Q. (By Mr. Grupp): Mr. Maroosis, did you have any conversation with Mr. Hedrick relative to this 100 cases of Three Rivers at any time?

A. Why, yes. As a matter of fact, he brought this copy back and showed us where we were 108 proof gallons overhead, I think. I made some pencil notations of his findings on the back of one of the sheets. And Mrs. Woodward told him at that time they had moved 40 cases.

The Court: How many cases over?

A. Just a minute, your Honor. I believe there was an over declaration of 108.98.

The Court: Are those gallons or cases?

A. Gallons, apparently. These are Mr. Hedrick's figures, not mine.

Mr. Collett: Is that in your handwriting, though?

A. Yes, that is in my writing.

Q. (By Mr. Grupp): Where did you get those figures?

(Testimony of Nick W. Maroosis.)

A. Mr. Hedrick was trying to explain to us why we were 108.98 gallons over and Mrs. Woodward told him we had only moved this [29] inventory—the inventory Mr. Medrick made was apparently on May 2nd, and Mrs. Woodward explained to him in the interim that 40 cases of Three Rivers had been moved out into 458 Geary, and I don't remember his remark or what he said relative to that. Apparently he chose to ignore it.

Q. That left how many cases at Haight Street?

A. 60 cases.

Q. What proof, the Three Rivers?

A. 86 proof.

Q. However, 60 cases 86 proof, do you know how may proof gallons that would be?

A. You will have to say that again.

The Court: Well, I submit, counsel, it is time for a ten minute recess. We will have it.

(Short recess.)

Mr. Grupp: May I have the last question?

(Question read by the reporter.)

A. 123.84.

The Court: 123.84 proof gallons in 60 cases?

A. Yes, sir.

Q. (By Mr. Grupp): So that the physical inventory that was taken by Mr. Hedrick on the 2nd or 3rd or 4th, one of those dates, as you stated, showed you had overstated, according to their inventory, 108 proof gallons?

A. Yes, sir. [30]

(Testimony of Nick W. Maroosis.)

Q. If they took into consideration the 60 cases remaining at that time in Haight Street, they would have completely wiped out that overstatement?

Mr. Collett: I object to that.

The Court: In the first place, that is leading, and in the second place it isn't correct. 108 proof gallons doesn't completely wipe out 123.84 proof gallons.

Mr. Grupp: It is the other way. 123 wipes out 108.

The Court: Well, let the witness testify.

A. Mr. Hedrick came up to the office and is showing Mrs. Woodward and myself this overcharge and apparent discrepancy in our figures. Mrs. Woodward showed him that we still had 60 cases that had been—40 cases had been moved and we had the 60 cases remaining, and as a matter of fact at that time Mr. Hedrick himself had knowledge of it because a month prior to that time, or over a month prior to that time when he was taking his inventory at 458 Geary he not only got a complete inventory of the number of cases of Three Rivers we had on hand April 1st, but he secured a list of 232 cases of the serial numbers of the Three Rivers we had on hand. The serial numbers included 100 cases that were at the Haight Street store on April 1, 1944.

Mr. Collett: If the Court please, I am going to move at this time the entire answer be stricken on

(Testimony of Nick W. Maroosis.)

the ground that there was no question and I object to the answer. [31]

The Court: It is voluntary, and, in addition, is confusing to me. That is stricken in which he says he knew it because of something that happened the month before.

Q. (By Mr. Grupp): All right, Mr. Maroosis, let's go back and get this plaintiff's exhibit 2 in evidence. Plaintiff's exhibit 2, as you testified, showed (that is the written inventory) showed you had on hand 2056 cases in the Haight Street store, is that correct? A. No.

Q. I mean in the Geary Street store.

A. Yes, sir.

Mr. Collett: I don't want to object, but I would like to have counsel ask questions and not testify.

Mr. Grupp: It is purely a matter of mathematics.

Mr. Collett: It isn't a matter of mathematics. The inventory is there. Let him answer the questions and not tell him.

The Court: What I say to counsel examining now is, I find, in cases frequently of assistance to opposing counsel when his witnesses are under examination. But I wish to say the following as to leading questions: Whenever counsel is not interested in whether I pay any attention to the answer to the leading question, counsel will indulge in a leading question. Whenever counsel is anxious I pay attention to the answer, counsel will let the witness make

(Testimony of Nick W. Maroosis.)

the answer and will not give a leading question. The reason is that the Court never knows [32] whether it is the attorney who is testifying, the attorney not under oath, and the witness being complacent, or the witness is actually testifying. So counsel themselves will respectively be the censors of their questions.

Q. (By Mr. Grupp): Mr. Maroosis, you have plaintiff's exhibit 2 in your hands? A. Yes.

Q. Will you then refer to pages 33, 36 and 37 and tell us, if you will, the number of bottles, total number of bottles of Three Rivers reflected in the written inventory.

The Court: Hasn't that already been testified to? If it has been testified to, there is no necessity—whenever anything is testified to, there is no necessity to put it in again even by leading questions.

Mr. Grupp: It is leading to the next question.

The Court: Ask the next question and forget the repetition for we will never get through.

Q. (By Mr. Grupp): Mr. Maroosis, calling your attention to May when you handed Mr. Hedrick the inventory of Haight, did you at that time give him any other documents?

A. Yes, I did. I gave Mr. Hedrick a copy of the serial numbers of the cases of Three Rivers whiskey, which was—it was at 232, as I recall.

Q. How were those serial numbers listed?

A. They were listed single, each serial number its own. [33]

(Testimony of Nick W. Maroosis.)

Q. Where were the Three Rivers, 231 cases of Three Rivers, at that time?

Mr. Collett: I object. We have been talking about 2056 bottles. There has been nothing said about cases. What cases are being talked about? The question is irrelevant.

The Court: Overruled.

Q. (By Mr. Grupp): Where were the 231 cases at the time you gave Mr. Hedrick the serial numbers?

A. 100 of the 231 were at the Haight Street store, 499 Haight Street, and the balance of those cases were at 458 Geary Street.

Q. The 2056 bottles that were at the Haight Street store, according to that inventory, constitutes how many cases?

A. There were not 2056 cases, there were——

Q. Geary Street. A. 2056 bottles.

Q. How many cases is that?

A. That would be approximately 175½ cases.

Q. Divided by 12 is the way you get your answer? A. Yes, sir.

Q. That would be 171 cases and 4 bottles?

A. Something like that.

Q. But the serial numbers you gave Mr. Hedrick were 231 cases. A. Yes, sir.

Q. Mr. Maroosis, now subsequently to the day of the inventory by Mr. Hedrick, did you thereafter receive any documents from [34] Mr. Hedrick relative to your floor tax rate?

(Testimony of Nick W. Maroosis.)

Mr. Collett: If the Court please, I am going to object to that as being ambiguous in this sense, that he has testified Mr. Hedrick first came there around the 2nd, 3rd, or 4th or 5th of May. We don't know how long Mr. Hedrick was there, how long the inventory took to complete, in order to try to fix this particular question. On that ground I object.

The Court: Overruled. As I understand it, this question requires merely a yes or no answer. You may read the question, Mr. Reporter.

(Question read by the reporter.)

A. Yes, any number——

The Court: You have answered the question?

A. Yes.

Mr. Grupp: Your Honor, I understand during recess I requested of counsel the originals of certain correspondence and letters that passed from Mr. Maroosis to the Internal Revenue, Alcohol Tax Unit, and I understand those originals will be produced by Mr. Hedrick tomorrow morning.

Mr. Collett: We would bring them. I don't know what the materiality of them would be. We can bring all the correspondence, if the Court please. Might show us the copy as we go along. This is an original document. This is a copy. This is a copy.

Mr. Grupp: You have examined this? [35]

Mr. Collett: Sure.

The Court: If you are going to refer to them, have it marked first.

(Testimony of Nick W. Maroosis.)

Mr. Grupp: May I have this document first (it has no title) marked plaintiff's exhibit for identification next in order?

(Whereupon the document referred to was marked plaintiff's exhibit No. 6, for identification.)

Q. (By Mr. Grupp): Mr. Maroosis, I hand you plaintiff's exhibit No. 6, for identification, and ask you if that document was handed you by Mr. Hedrick? A. Yes, sir.

Q. And did you have a discussion with Mr. Hedrick relative to the figures contained in that document? A. Yes, I did.

Q. Do you recall when that was, Mr. Maroosis?

A. No, I do not.

Q. Have you any approximation?

A. No, I would be afraid to venture a guess.

Q. Relative to the filing of the assessment which was levied, or the first assessment which was levied, was that before or after that time, do you know?

A. I believe this was the first assessment that they offered me, first assessment Mr. Hedrick came in with, I should say.

Mr. Grupp: Do you have copies of those assessments, Mr. [36] Collett? I think there were three different assessments levied and changes made. Well, is there any question about the document the witness has as being the basis of the first assessment? Well, in that event, might I at this time

(Testimony of Nick W. Maroosis.)

offer this in evidence, Mr. Collett? Do you have any objection?

Mr. Collett: No.

The Court: Exhibit 6 is offered?

Mr. Grupp: Yes, your Honor.

The Court: No objection, admitted.

(Whereupon document marked for identification was admitted into evidence as plaintiff's exhibit No. 6.)

Q. (By Mr. Grupp): Now, Mr. Maroosis, I call your attention to plaintiff's exhibit 6 and note thereon that on page 2 the total amount due as listed here for taxes and penalties, \$13,572.76. I specifically call your attention to the first page of that document, referring to that portion which reads, "Taxpayer's inventory and return form 758 for November 1, 1942, 1,080.86 P.G."—referring to proof gallons? A. Yes, sir.

Q. Specifically with reference to that notation did you have any conversation with Mr. Hedrick?

A. Yes, I did.

Q. What was that? Who was present at that conversation?

A. Mr. Hedrick and Mrs. Woodward and myself.

The Court: November 1st of 1942? [37]

Mr. Grupp: Yes, that is the starting of it, yes, sir, November 1, 1942.

Q. Where was that conversation had?

A. I believe it was held down at Mr. Hedrick's offices down on Battery Street some place.

(Testimony of Nick W. Maroosis.)

Q. Will you state what was said at that time?

A. I tried to explain to them that the inventory that they were using in their calculations was the 458 Geary Street inventory, that they were using the wrong inventory, the wrong store inventory, and we showed them several other mistakes they were making here, but they only acknowledged the one, apparently, because subsequently we received an adjustment as against this sheet.

Q. Mr. Maroosis, now, under plaintiff's exhibit 6 there is an item showing purchases as per the ATU—that is Alcohol Tax Unit, is that correct?

A. Yes.

Q. Audit of invoices in wholesale liquor dealers files? A. Yes, sir.

Q. Showing by that that you had made purchases, according to that audit, of \$203,167.38?

A. That is correct.

Q. Do you keep purchase records?

A. Yes, sir.

Q. In what form are those records? [38]

A. We have a double entry check system.

Q. I note here that the next item appearing on plaintiff's exhibit 6, amount of money after the number I have read, is "Distilled Spirits Purchased 11/1/42 to 3/31/44 per taxpayer's records is \$203,208.51." A. Yes, sir.

Q. That is \$40.13, I believe, but I couldn't calculate—more purchases shown on the records of Mr. Maroosis than by the audit of the Alcohol

(Testimony of Nick W. Maroosis.)

Tax Unit of the wholesalers' books. Now, Mr. Maroosis, that figure of \$203,208.51 is a correct figure is it not? A. Very correct.

Q. Taken from your books? A. Yes, sir.

Q. I also note here that there is an item of the sales of distilled spirits—rather, total sales I am referring to for the period November 1, 1942, to March 31, 1944, of \$276,328.51 A. Yes, sir.

Q. Do you know where that figure was obtained?

A. From our books.

Q. From your own records? A. Yes, sir.

Q. So that your records disclosed the purchases used in these calculations by the Alcohol Tax Unit?

A. Correct. [39]

Q. Your record disclosed this gross sales used by the Alcohol Tax Unit per these calculations, is that correct? A. That is correct.

Q. The starting inventory which was used in plaintiff's exhibit 6, as of November 1, 1942, which is 1080.86 proof gallons, was a record taken from your books? A. That is correct.

Q. I notice, and I believe it has been stipulated to, that the starting inventory on Geary was 631.93 proof gallons, and that is the figure that should have been used? A. That is correct.

The Court: Starting figure for Geary Street on what date?

Mr. Grupp: November 1, 1942.

Mr. Collett: That was a stipulation, if the Court please. Is there any doubt in your mind about it?

(Testimony of Nick W. Maroosis.)

Mr. Grupp: Oh, no.

The Court: How many gallons?

Mr. Grupp: 631.93 gallons.

Mr. Collett: You are taking a lot of time about something we have stipulated to.

Mr. Grupp: Now we offer for identification the letter of April 28 from the Treasury Department to Mr. Maroosis.

The Court: Exhibit 7 for identification.

(Whereupon the letter referred to was marked plaintiff's exhibit No. 7 for identification.) [40]

The Court: What is it? What date?

Mr. Grupp: April 28, 1945.

Mr. Collett: May I see it?

Mr. Grupp: Certainly. I have no objection to your reading them, but I offer them because they are going in and it will save time.

Q. Did you receive this letter on or about the date it bears? A. Yes, sir.

Mr. Grupp: We offer in evidence plaintiff's exhibit 7.

Mr. Collett: No objection.

The Court: Admitted.

(Whereupon letter of 4/28/45, Treasury Dept. to Mr. Maroosis was marked plaintiff's exhibit 7 in evidence.)

Q. (By Mr. Grupp): Now, Mr. Maroosis, I note that in plaintiff's exhibit 6 the total tax and

(Testimony of Nick W. Maroosis.)

penalties claimed by the Alcohol Tax Unit was \$13,572.76; and on April 28, 1945, I note from plaintiff's exhibit 7 (you received this letter) reference is made to your calling in person at the office on April 26, 1945, about a notice or demand for additional tax and penalty in the amount of \$10,498.81. Have you any knowledge, Mr. Maroosis, as to what occasioned a reduction from the original demand of \$13,572.76 to \$10,498.81?

A. They were using the wrong inventory in their calculations.

Mr. Grupp: We offer the letter of June 29, 1945, from the Treasury Department to Nick W. Maroosis as plaintiff's [41] for identification next in order.

(Whereupon letter referred to was marked plaintiff's exhibit 8 for identification.)

Q. (By Mr. Grupp): I will ask you, Mr. Maroosis, if you received plaintiff's exhibit 8 for identification on or about the date that letter bears?

A. Yes, sir.

Q. June 29, 1945? A. Yes.

Mr. Grupp: Exhibit 8 is now offered as next in evidence.

Mr. Collett: No objection.

The Court: Admitted.

(Whereupon letter of 6/29/45, Treasury Dept. to Mr. Maroosis, was admitted into evidence as plaintiff's exhibit 8.)

Mr. Grupp: Do you have the agreement to pay

(Testimony of Nick W. Maroosis.)

the additional assessment? Our copy is not executed.

Mr. Collett: I don't get the materiality. If you want to stipulate, he paid them all. They were paid.

Mr. Grupp: Our purpose in offering this is the fact that now we find that the taxpayer finally paid \$8,478.65, which I believe is the amount that was ultimately paid.

Mr. Collett: Yes.

Mr. Grupp: Our purpose is to show these reductions for reasons which will be more obvious later on.

Mr. Collett: As I recall, the answer alleges payments made, [42] and I think we admitted them, didn't we?

Mr. Grupp: I offer this as next in order after the previous communications.

Mr. Collett: No objection.

Q. (By Mr. Grupp): Now, Mr. Maroosis, you thereafter filed a claim, or had your accountants file a claim for refund? A. Yes, sir.

Q. After you paid this tax? A. Yes, sir.

Mr. Grupp: May I just pass that for a moment, your Honor? We will fix that claimed refund.

Q. Mr. Maroosis, you sold Joseph's Liquor Store at 458 Geary Street, did you not?

A. Yes, sir.

Q. When did that sale take place?

A. May 25, 1944.

(Testimony of Nick W. Maroosis.)

Q. That was within the month that these returns were made and the inventories were taken, is that correct? A. Yes, sir.

Q. And at that time of the sale of that store the State Board of Equalization conducted an audit, did they not? A. Yes, sir.

Mr. Grupp: I think I could approach that more expeditiously if I referred again to this correspondence, this claim, for all these documents are attached to the claim. There is no [43] question but what this claim was filed? I think it was admitted.

Mr. Collett: You filed the complaint, you should know.

Mr. Grupp: I mean it was filed with the Internal Revenue Department with all attached exhibits?

Mr. Collett: Isn't that admitted in the answer?

Mr. Grupp: I think it is. We will offer a copy of the claim and the attached exhibits, which was filed, for identification as plaintiff's next in order.

Mr. Collett: You have checked that copy with your copy of the complaint, and it is a true copy?

Mr. Grupp: It is a true copy. As a matter of fact, I think the complaint was copied from that. I think this will be No. 9 for identification.

(Whereupon document was marked plaintiff's Exhibit 9 for identification.)

Mr. Grupp: With counsel's permission, I should like to withdraw Exhibit No. 9, if I might. I don't have another copy and I may want to look through it this evening.

(Testimony of Nick W. Maroosis.)

The Court: It has not been admitted yet.

Mr. Grupp: That is why I didn't want to offer it yet.

Q. Mr. Maroosis, I hand you plaintiff's Exhibit 9 for identification, and I will ask you if that was filed by you with the Department of Internal Revenue, Alcohol Tax Unit, on the date it bears?

A. Yes, sir. [44]

Q. August 6, 1948? A. Yes.

Q. Is that correct? A. That is correct.

Mr. Grupp: We will offer in evidence plaintiff's Exhibit 9, for identification, as plaintiff's exhibit next in order.

The Court: Exhibit 9 offered.

Mr. Collett: No objection.

The Court: Admitted.

(Whereupon document dated 8/6/48 was admitted into evidence as plaintiff's exhibit No. 9.)

Q. (By Mr. Grupp): Now, Mr. Maroosis, we were referring a moment ago to an audit by the State Board of Equalization, and I will ask you if the photostatic sheets attached to plaintiff's exhibit 9 is a certified copy of that audit as received by you from the State Board of Equalization?

A. Yes, it is.

Q. Now, Mr. Maroosis, did you have that audit checked in any way?

A. Yes, I was quite alarmed and surprised when I got an additional fee due \$750, so we spent three weeks on it, and after she compiled her figures

(Testimony of Nick W. Maroosis.)

and we found that the State Board of Equalization's figures were reasonably close to hers, subsequently we paid the fee of \$750.

Q. Do you know when that fee was paid?

A. No, I don't know. It was shortly thereafter.

Q. And was that before any assessment was levied against you by the Alcohol Tax Unit?

A. Oh, yes.

Mr. Grupp: Might I at this time offer the original letter from the State Board of Equalization, August 25, 1944, for identification? It has a note on there.

Mr. Collett: Don't ask me.

Mr. Grupp: I merely showed it to you.

Mr. Collett: You have offered the claim in evidence. It is in the claim.

Mr. Grupp: I offer this for identification for a special reason, because it does have notations as to when it was paid, and that will clear up that other point.

(Whereupon document was marked plaintiff's exhibit 10 for identification.)

Q. (By Mr. Grupp): Mr. Maroosis, I hand you plaintiff's exhibit 10 for identification. That is an original letter from the State Board of Equalization, is that right? A. Yes, sir.

Q. I call your attention to a notation on the letter in pencil. In whose handwriting is that?

A. I believe that might be Mrs. Woodward's.

(Testimony of Nick W. Maroosis.)

Q. Who is Mrs. Woodward?

A. She is my accountant.

Q. Would you read that pencil notation? [46]

A. "\$750 paid, check 2071, December 29, 1944."

Q. Does that refer to your check number?

A. Yes, sir.

Q. For the sum of \$750? A. Yes, sir.

Mr. Collett: I am going to object to that testimony as being purely hearsay. The best evidence is the check itself, and he doesn't know whose handwriting it is in.

The Court: Objection sustained. Was exhibit 10 offered?

Mr. Grupp: Exhibit 10 I will ask permission at this time to withdraw so that the witness may take it with him to produce the check in the morning.

The Court: Exhibit 10 for identification is rejected by the Court. Plaintiff may take such for the purpose stated.

Q. (By Mr. Grupp): Now, Mr. Maroosis, will you explain to the Court the type of liquor store that Joseph's was——

A. Very high class.

Q. ——as of November 1, 1942, to April 1, 1944?

A. It was a very high class store. It dealt mostly in imported liqueurs, and as a matter of fact, catered to some of the finest people in San Francisco and looked more like a jewelry store than a liquor store.

Mr. Collett: I object to the answer. It is purely a conclusion of the witness, and the best evidence as

(Testimony of Nick W. Maroosis.)

to the type of goods handled in the store is the inventory and audit [47] and the prices that might be attached to it.

The Court: Motion denied. The answer will stand for what it is worth. It might not be as persuasive as some of the other evidence, but at least it is in.

Q. (By Mr. Grupp): Do we have a record of sales of Joseph's?

A. It is in my files, the sales at Joseph's.

Q. Will you step down and get it? Mr. Maroosis, looking at your inventory, plaintiff's exhibit 2 in evidence, you have examined that inventory before? A. Yes, sir.

Q. With reference to the liqueurs as distinguished from whiskey or other alcoholic beverages, do you have a list of such liqueurs in that inventory?

A. Surely.

Q. That store was located where, Mr. Maroosis?

A. On Geary Street directly across the street from the Geary Theater.

Q. Do you have any documents here from which you can tell the Court what your average monthly sales for a given period, let us say three months, of beer was in that store?

A. Practically negligible. We sold very little beer in that store. That store was a downtown store, and it is only in neighborhood stores they sell beer.

Mr. Collett: I object to the answer as not re-

(Testimony of Nick W. Maroosis.)

sponsive. He was asked if they had any record. [48]

The Court: Let me hear the question.

(Question read by the reporter.)

The Court: Strike it out, and the witness will pay particular attention to the question and answer the question in every case you can answer it, yes or no.

Q. (By Mr. Grupp): Do you have any records?

A. Yes.

Q. Do you have them in court here from which you can testify?

A. Yes, they could be here. I wouldn't swear they are. I am trying to get along with this thing as well as everybody else. I don't know.

Q. You operated, Mr. Maroosis, Joseph's for how long?

A. Oh, approximately—we operated it approximately, I would say, somewhere in the neighborhood of two and a half years, possibly.

Q. And you operated during that same time two other liquor stores in San Francisco? A. Yes.

Q. Retail package stores? A. Yes.

Mr. Collett: If the Court please, this has been asked and answered at least three times.

Q. (By Mr. Grupp): Can you tell us from your own knowledge the comparative sales of beer, for example, in the Fillmore Street store as compared with the Geary Street store in a [49] given period?

A. Yes, sir.

(Testimony of Nick W. Maroosis.)

Mr. Collett: I object to the question. The witness stated the records are here, or should be here, and the best evidence are the records.

The Court: Well, he may answer the question yes or no. When you get that, I don't know whether it will help us any. He has answered it yes. You may proceed.

Q. (By Mr. Grupp): Can you give us any comparison from your own knowledge of the difference in the sales of that particular type of merchandise, namely, beer? A. Yes, sir.

Mr. Collett: My same objection?

The Court: He has answered yes. That is enough.

Q. (By Mr. Grupp): Will you give us such comparison, if you know?

A. Yes. The Geary Street——

The Court: Just a moment.

Mr. Collett: I object to the question as not being the best evidence, calling merely for the conclusion and opinion of the witness. The best evidence would be the records of this particular plaintiff and he stated the records are here. Let's testify from the records.

The Court: I am not too sure whether the objection is well taken. I am inclined to think technically the witness [50] may answer. I will let witness' counsel know where records are available the oral statement will not be convincing. If you want to take time to have him answer the question—I will overrule the objection in practice.

(Testimony of Nick W. Maroosis.)

Mr. Grupp: I will withdraw the question in the face of that. I know we have records some place. We will produce them. We have so many records, I think some of them are quite varied.

A. May I answer something?

Mr. Grupp: No, don't volunteer anything, Mr. Maroosis.

Q. Mr. Maroosis, can you tell us what the average proof of liqueurs such as were handled at Joseph's was, the average proof?

A. I would say the average proof would probably be somewhere——

Mr. Collett: Oh, I make the same objection.

The Court: Overruled.

A. The average proof would be somewhere around 45 to 50 proof.

Q. And in whiskeys?

A. In whiskeys the average would be probably around 80—in Joseph's it would be probably around 87 proof, 86 maybe.

Q. You stated you sold Joseph's in May, May 25, 1944, Joseph's Liquor Store? A. Yes, sir.

Q. At the time that that was sold was there an inventory taken of the merchandise on hand?

A. Yes, sir.

Mr. Grupp: Might we offer this document marked "Inventory, [51] May 25, 1944" for identification next in order?

The Clerk: No. 10 was rejected. Do you want to continue that as No. 10?

(Testimony of Nick W. Maroosis.)

The Court: It will still be called exhibit 10 for identification.

The Clerk: This is exhibit 11 for identification.

(Whereupon inventory of May 25, 1944, was marked plaintiff's exhibit No. 11 for identification.)

Q. (By Mr. Grupp): Mr. Maroosis, I hand you plaintiff's exhibit No. 11 for identification.

A. Yes, sir.

Q. And ask you what that document is.

A. That document is the balance of merchandise that was left at the sale of Joseph's, 458 Geary Street, May 25, 1944.

Q. I notice that is a typed inventory.

A. Yes, sir.

Q. Was there a pencil inventory?

A. Yes, sir.

Q. Do you have that? A. Should have it.

Mr. Collett: I will ask that the witness answer the question.

A. Yes.

Q. (By Mr. Grupp): Mr. Maroosis, I notice on this there is a certification of this by yourself. Did you compare this with [52] the pencil copy?

A. Yes, sir.

Q. Now, do you know where the pencil copy of this inventory is?

A. I believe in my briefcase. It may be up in the office.

(Testimony of Nick W. Maroosis.)

Q. Do you know that this is a correct inventory of Joseph's as of the date it bears, May 25, 1944?

A. Yes, sir, I know it is for two reasons. One reason is that Mr. DiMaggio checked it himself, Mr. DiMaggio's employees checked it, Mr. DiMaggio's accountant checked it, and then they questioned me to sign it to be sure it was correct, as it was.

Q. This was taken for the sale purpose?

A. Yes, sir, for the sale at Geary on that particular day, May 25, 1944.

Mr. Grupp: We will offer plaintiff's exhibit 11 in evidence as exhibit next in order.

Mr. Collett: I will ask that the—I object to it. It is a pencil inventory and the actual inventory taken the witness answers it is here and available, and I ask that they produce it.

Mr. Grupp: We will produce it. Your Honor, might this be admitted subject to counsel's checking it against the inventory?

The Court: It is within a couple of minutes of adjournment. I should like to take under advisement this offer and objection until tomorrow morning. Perhaps you can have it [53] supported by the penciled notation.

Mr. Grupp: I think we can, your Honor.

The Court: If you can, that may throw another aspect on it. If you can't, that will be something else again. All right, ruling reserved. Exhibit 11 for identification offered, objected to, and ruling reserved.

(Testimony of Nick W. Maroosis.)

Mr. Grupp: Might I, your Honor, with the Court's permission, withdraw plaintiff's exhibit 9?

Mr. Collett: No objection.

The Court: Exhibit 9 may be loaned to plaintiff's counsel over the evening, not withdrawn.

Mr. Grupp: I meant borrow it.

The Court: All right. Now, counsel, I am concerned about this case and the calendar. First, I hope you spend the time over the evening thinking of questions that you can eliminate rather than considering additional questions to ask. Many of the questions today have been unnecessary. They have been merely prelude to another question and have been repetitious or intended as premature argument. Try to cut them out. That is one. Second, I have set for tomorrow for trial a case that is a criminal case, United States vs. Manning, which I expect to proceed with at 10:00 o'clock. I am going to let you people come here at 9:30. We will see what happens to that case and how much of an interruption you have. You may have a substantial interruption and you may not. The trial of this cause [54] is adjourned until tomorrow morning at 9:30.

(Thereupon an adjournment was taken until Thursday, November 17, 1949, at 9:30 a.m.)

November 17, 1949

The Clerk: Maroosis vs. Smyth, on trial.

The Court: You may proceed, gentlemen.

NICK W. MAROOSIS

resumed the stand, previously sworn.

Direct Examination
(Continued)

By Mr. Grupp:

Q. Your Honor, might the record show I am now returning exhibit 9 which I borrowed from the clerk?

The Court: It may.

Q. (By Mr. Grupp): Mr. Maroosis, I believe at the close of the session yesterday we had asked whether you had the penciled inventory, defendant's exhibit 11 for identification; that was the type-written copy of the inventory of May 25, 1944. Have you made a search of the penciled copy of that inventory to your record?

A. Yes, I have.

Q. Have you been able to find it? A. No.

Q. Now, would you explain to the Court the purpose of taking that inventory which you now hold? A. This inventory was taken——

The Court: Is that exhibit 11 you are referring to?

Mr. Grupp: I am sorry, I should have referred to that.

A. This inventory was taken by Mr. DiMaggio, an accountant, and myself, for the purpose of selling this particular merchandise to them. They took the inventory, they compiled it, it was [55] type-written into three copies which—on which money they paid with, they paid this money. We also,

(Testimony of Nick W. Maroosis.)

each one of us, certified the copy to each other, and that was the basis on which the money, the basis on which the store was sold. This merchandise was sold to them, they paid for it, and naturally must be accurate. We checked it.

Q. I see. Well, then, the inventory was taken particularly for the purpose of making the sale?

A. Yes, sir.

Q. And you have not been able to find the copy?

A. No, sir.

Q. That is the original? A. Yes, sir.

Mr. Grupp: We offer in evidence at this time plaintiff's exhibit 11 for identification.

Mr. Collett: May it please the Court, I object to that as being irrelevant, immaterial, incompetent; it apparently shows the transaction as related to the sale of certain merchandise to Mr. DiMaggio. No evidence whatsoever to show that this was all the merchandise that was concerned with this particular store from the period subsequent to April 1 towards indicating anything with regard to the accounting of that merchandise, simply an inventory was sold to Mr. DiMaggio, and on that ground we object as being incompetent, irrelevant and immaterial, bearing not at all on the issues. [56]

The Court: There is no evidence that there was no goods removed other than through retail sales in the ordinary course of business.

Mr. Grupp: No, I was about to go into that. The purpose is merely to show what was in the

(Testimony of Nick W. Maroosis.)

store on May 25. There was merchandise removed and the evidence will immediately show——

The Court: I will reserve ruling until I hear——

Mr. Collett: Further than that, if the Court please, the witness has stated it was a sale, a merchandise inventory of a sale, not merchandise to the particular individual, and the Court is called attention there is no evidence that there was any merchandise removed; on the contrary, no evidence that this includes all of the merchandise.

The Court: I say, there has been no evidence, so I am reserving ruling.

Q. (By Mr. Grupp): Mr. Maroosis, after the inventory which you took, which is plaintiff's exhibit 2 in evidence, or which you took on April 1, 1944, you purchased merchandise on the open market for 458 Geary Street, did you not?

A. Yes, sir.

Q. You conducted that business thereafter?

A. Yes, sir.

Q. And subsequent to the Alcoholic Tax Unit men taking their physical inventory on either May 2, 3 or 4, as you testified, did you thereafter purchase merchandise on the open market or [57] from wholesalers for that store? A. Yes, sir.

Q. Now, subsequent to April 1, 1944, until what time—what did you do, did you yourself actually buy and sell merchandise in the same manner as you did previous to April 1, 1944? A. Right.

Mr. Collett: If the Court please, I object to this

(Testimony of Nick W. Maroosis.)

line of questioning; again counsel is testifying, and request that he give yes or no answers. I again call attention to the previous——

The Court: I would prefer you asked the witness what was done other than for counsel suggesting to the witness what was done.

Q. (By Mr. Grupp): Mr. Maroosis, would you explain then what was done with that business subsequent, referring to 458 Geary Street, subsequent to April 1, 1944? A. Well,——

Mr. Collett: I object to that question.

The Court: Overruled.

A. On April 1 we took our inventory, that was the particular date that I took physical control at 458 Geary. Previous to that I was a partner at 458 Geary.

Q. Go forward from there, please.

A. From that point on I took the physical control of it myself, maintained all the records, had complete supervision of the clerks, and the reason that I took the physical control was for [58] the purposes of selling or liquidating the store. We secured a buyer, I believe on or about the—somewhere in the early part of May. Mr. DiMaggio wanted to buy the place on the 25th day of May. We had arrived at it prior to the 25th, but it was effective on the 25th. We did take the physical inventory for the purpose of selling the establishment. Mr. DiMaggio and his accountants and myself took the inventory. The inventory was typed out in three copies of which——

(Testimony of Nick W. Maroosis.)

Q. I was particularly interested in reference to the operation of the business between the dates that you have now referred to, April 1 and May 25, and removal of merchandise, if any was removed.

A. Well, at the particular time on May 25, shortly prior to May 25, Mr. DiMaggio—we had considerable merchandise on hand. We had some odd \$40,000; I wouldn't be quoted, but somewhere in that neighborhood. Mr. DiMaggio did not have this much money, so he suggested that we remove some of the inventory, which we did on May 25. The balance of the merchandise was bought and paid for by Mr. DiMaggio.

Q. Mr. Maroosis, was that merchandise—you say it was removed; was that removed before or after plaintiff's exhibit 11 for identification was taken?

A. Well, it was on or about that same day, May 25.

Q. Does the plaintiff's exhibit 11 for identification include merchandise that was subsequently removed? A. No, sir. [59]

Mr. Collett: If the Court please, I am going to ask at this time, renew my objections to the inventory and ask——

Mr. Grupp: I haven't offered it again yet.

The Court: Well, counsel, your objection is premature.

Mr. Collett: I am going to ask the Court the witness be directed to produce the records of the business for the period from April 1 to May 25,

(Testimony of Nick W. Maroosis.)

showing all purchases and all disposition of merchandise.

The Court: I will hear what is offered first, and then we can cross the bridge.

Mr. Grupp: I have here two—what purports to be an original and copy of a document titled “Merchandise Transfer Sheet,” dated May 25, 1944, and then under that—to that is attached is another dated the same date, and an adding machine tape with some notes on it which I would at this time ask to be marked as plaintiff’s exhibit 12 for identification.

The Clerk: Plaintiff’s exhibit 12 for identification.

Mr. Grupp: Might at this time have marked for identification another set of two originals and two copies of “Merchandise Transfer Sheets,” one dated May 23, 1944, and one dated May 25, 1944, as plaintiff’s exhibit next in order for identification, your Honor.

The Clerk: Plaintiff’s exhibit No. 13 for identification.

Mr. Grupp: While counsel is looking at those, I ask this book which I have, have the Clerk mark it plaintiff’s exhibit [60] for identification next in order.

The Court: You may.

The Clerk: Plaintiff’s exhibit No. 14 for identification.

Mr. Grupp: One of the duplicates seems to have

(Testimony of Nick W. Maroosis.)

been torn from one of them; might I add that to Plaintiff's Exhibit 12 for identification, your Honor?

The Court: What do you wish to do?

Mr. Grupp: When I refer to Plaintiff's Exhibit 12 for identification, I noticed that there was two originals and one duplicate. We find the duplicate has been torn from it, and should be two duplicates.

The Court: That may be added. Exhibit 12 for identification is completed by the addition of one duplicate, so now it has two originals and two duplicates as directed by attorneys for plaintiff.

Q. (By Mr. Grupp): Mr. Maroosis, I am handing you Plaintiff's Exhibits 12 and 13 for identification and ask you what those represent.

A. Those represent the portion of the whiskey that was transferred out of 458 Geary to one of the—for No. 499 Haight Street and No. 2066 Fillmore Street.

Q. You say "one of the"; would you refer to the exhibit that refers to?

A. Exhibit No. 12 is from 458 Geary to 2066 Fillmore Street, and Exhibit 13 is from 458 Geary to 499 Haight Street. [61]

Q. Now, I note that the documents which comprise these two exhibits, 12 and 13 for identification, are printed and entitled "Merchandise Transfer Sheet, Bi-Rite Liquor Stores."

A. That is right.

Q. They are regular forms you used in the ordi-

(Testimony of Nick W. Maroosis.)

nary course of your business? A. Yes, sir.

Q. And is the manner in which the transfers are here posted done in the normal and regular course of the operation of your business?

A. Yes, sir.

Mr. Grupp: We offer in evidence Plaintiff's Exhibits 12 and 13 for identification.

Mr. Collett: You are offering them in evidence?

Mr. Grupp: Yes.

Mr. Collett: We object to it, if the Court please, irrelevant, immaterial, and incompetent, that the best record, the best evidence of the transactions of this particular concern from the period April 1, 1944, to May 25, 1944, is the records of the business showing the purchases from the time of the inventory that is at issues, the sales and other dispositions as shown in the books of account. This evidence is only incidental. There is no proof as to when they were drawn up, might be drawn at any time, and on that basis the objection is made.

Mr. Grupp: I will lay further foundation, your Honor. [62]

The Court: All right, you may.

Q. (By Mr. Grupp): Mr. Maroosis, I hand you Plaintiff's Exhibit 12, and I call your attention to the two original transfers and ask you when were those documents comprising that exhibit drawn?

A. On May 25, 1944.

Q. When was the transfer of the liquor therein reflected made?

(Testimony of Nick W. Maroosis.)

A. On May—well, just a moment, now—the transfer was actually made on May 25, also. However, in the case of one, the state's Exhibit No. 13, the merchandise was on the duplicate.

Q. Just a minute, now. You are referring to 12?

A. No. 12; both were transferred on May 25, 1944.

Q. The documents were drawn on May 25?

A. Yes, sir.

Q. Now, with reference to Plaintiff's Exhibit No. 13 for identification, will you tell us when those documents were drawn?

A. Those documents were both drawn on—one was drawn on May 25, the other was drawn on May 23.

Q. And when were the liquors therein set forth transferred?

A. The liquors that were of which the copy was marked May 23, was transferred on May 23, and the copy marked May 24, that particular merchandise was part of the 100 cases that remained at 499, consequently a transfer sheet was made. The merchandise was already in the store.

Q. 499 what? [63]

A. 499 Haight Street.

Q. What merchandise are you referring to?

A. 30 cases of Three Rivers whiskey.

Q. On May 25 there were 30 cases of Three Rivers whiskey still remaining?

A. There was 60 cases, 30 of which were trans-

(Testimony of Nick W. Maroosis.)

ferred from 499 Haight to 458 Geary and 2066 Fillmore Street.

Q. Referring now to the second transfer sheet of Plaintiff's Exhibit No. 12, which refers to 22 cases of Three Rivers whiskey and 8 cases——

A. That is correct.

Q. That whiskey was in Haight Street and transferred from Haight Street to Fillmore Street?

A. That is correct.

Q. The other 30 cases transferred on May 23——

A. May 25.

Q. Now, Mr. Maroosis, I think——

I think the witness has testified these were in the regular course, we are reoffering them at this time.

Mr. Collett: Renew my objection, if the Court please, and add further it is self-serving, that the evidence might be admissible if they had shown the books of account, shown certain transfers to books to corroborate. The best evidence is the books of account showing wherein this was charged, the merchandise of the store, and in what manner the entries in the [64] book were kept to show the total acquisition from the time of the inventory of April 1 and the dispositions that were made, either by transfer or by sale by this particular inventory that they have previously sought to introduce in evidence.

The Court: An edifice cannot be built simultaneously, it must be brick by brick.

Mr. Collett: Yes, but if the Court please, the thing to do is to lay the foundation.

(Testimony of Nick W. Maroosis.)

The Court: The objection further goes to the weight or persuasiveness of the exhibit and not to its admissibility. Maybe other evidence will be more persuasive. The objection is overruled; exhibits 12 and 13 are admitted.

The Clerk: 12 and 13 admitted into evidence.

(Whereupon the exhibits previously for identification were received in evidence and marked Plaintiff's Exhibits 12 and 13, respectively.)

Q. (By Mr. Grupp): This book which I am holding, will you explain to the Court what that is; Plaintiff's Exhibit 14 for identification.

A. That is a book of accounts, 458 Geary Street, the store that was known as Joseph's Liquor Store.

Q. When you say the book of accounts, what does that book contain specifically?

A. That contains everything, contains the ledger, it has the accounts receivable, accounts payable; it is a complete [65] accounting book. It is a double-entry system, has a check system. It is supposed to be one of the most efficient records in the liquor business.

Q. That book also contains the journals?

A. Yes, sir.

Q. Handing you Plaintiff's Exhibit 14, Mr. Maroosis, I will ask you if that book was kept by you or someone under your direction for Joseph's Liquor Store at 458 Geary Street up to the time that that business was sold to Tom DiMaggio?

(Testimony of Nick W. Maroosis.)

A. Yes, sir.

The Court: I don't know what is going on. You gave him a double question and the alternative.

Mr. Grupp: Might I restate the question?

Q. Mr. Maroosis, are there any other books, permanent records, that were kept for 458 Geary Street other than that document which you now hold in your hand, Plaintiff's Exhibit 14 for identification?

A. No need, this is complete in itself.

The Court: That doesn't answer the question.

The Witness: No permanent records; this is the permanent record.

Mr. Collett: Let us have the answer to the question, any other records kept. He said no permanent record.

Mr. Grupp: I asked any other permanent records. We offer in evidence Plaintiff's Exhibit 14 for identification. [66]

The Court: No question as to who kept this? He was asked whether he kept it or someone else kept it, and he said yes.

Mr. Grupp: I asked, kept under his direction.

The Court: I don't know whether he kept it, or kept under his direction.

Q. (By Mr. Grupp): Mr. Maroosis, will you tell us how that book was kept, and by whom?

A. Well, in our operation we had a number of liquor stores and consequently we had two girls that were employed full time, one part time, but one

(Testimony of Nick W. Maroosis.)

was the accountant that was kept full time. She invariably kept the books.

Q. And what was her name?

A. Mrs. Woodward.

Q. Where is she now?

A. She is in the nut house.

Q. She isn't with you any longer?

A. No, she is not.

Q. Was she an accountant, did you say?

A. Yes, sir.

Q. And how long did she work for you?

A. Oh, for several years.

Q. How long? A. Five years.

Q. And were these records examined periodically by outside [67] accountants other than your regularly employed accountants? A. Yes, sir.

Q. And can you tell the Court who were these other accountants that examined these accounts?

A. Andrews and John Forbes.

The Court: It is now ten o'clock. I will interrupt this matter.

(Whereupon an adjournment was taken until 1:00 p.m., Friday, November 18, 1949.) [68]

Afternoon Session, Friday, November 18, 1949
at 1:00 o'Clock

The Court: All right, gentlemen.

Mr. Grupp: Your Honor, I think counsel and I have arrived at an agreement which will expedite

the introduction of certain exhibits which we feel are necessary.

The Court: All right, I am glad of that.

Mr. Grupp: Counsel, I have explained I thought we had arrived at a more expeditious method of introducing the various exhibits, with the understanding the exhibits referred to will be introduced. We now offer in evidence Plaintiff's Exhibit 14, which is the ledger book.

Mr. Collett: No objection.

The Court: Admitted.

(Whereupon ledger book was marked Plaintiff's Exhibit No. 14 in evidence.)

Mr. Collett: This is on the understanding, if the Court please, that there are certain of these records that are missing and he is going to admit they are missing.

Mr. Grupp: That is not the ledger.

Mr. Collett: I know, but the ledger isn't part of the missing records—you told me you would stipulate that they were missing.

Mr. Grupp: We will stipulate and admit that certain records, and the question will arise as to whether or not they [69] are part of the permanent records of the books, but there are certain additional records that are at this time not available.

Mr. Collett: We will state what they are.

Mr. Grupp: May I go ahead with the statement? I will get to this. We now offer as plaintiff's exhibit next in order a black looseleaf book which

(Testimony of Nick W. Maroosis.)

purports to be a daily perpetual inventory, records covering the period of Joseph's, commencing with March 31, 1944, and covers it to the closing date of that store, May 25, 1944.

Mr. Collett: If your Honor please, this is subject to the Court's conclusion as to the materiality of it. They want to get it in. I have no doubt about its materiality, but I am not going to object to its going in.

The Court: Just what is it?

Mr. Grupp: Daily perpetual record from March 31, 1944 to the closing inventory date, May 25, 1944.

The Court: It is offered?

Mr. Grupp: It is offered in evidence.

The Court: It is admitted for what it is worth.

(Whereupon the daily perpetual inventory, March 31, 1944, to May 25, 1944, was admitted into evidence as Plaintiff's Exhibit No. 15.)

Mr. Grupp: Incidentally, might the record show that the black book is the record of items—daily perpetual record of items other than whiskeys? [70]

Mr. Collett: Correct.

Mr. Grupp: We now offer a group of looseleaf pages similar to those contained in Plaintiff's Exhibit 15, but in the whole this constitutes the daily perpetual inventory from March 21, 1944, to May 25, 1944, of the whiskey in the same location, that is, Joseph's, 458 Geary.

Mr. Collett: No objection, subject to the same reservation, if the Court please. It is the month of

(Testimony of Nick W. Maroosis.)

March and the period in question is prior to April 1, and the period from May 25 to April 1 is not an inventory of any particular significance so far as the period involved in the course of the transactions prior to April 1.

The Court: Exhibit 16 is admitted for what it is worth.

(Whereupon group of looseleaf pages, inventory from March 21, 1944, to May 25, 1944, was admitted into evidence as Plaintiff's Exhibit 16.)

Mr. Grupp: We now offer a group of sheets which is a recap of the daily sales of Joseph's, 458 Geary Street, from the date the store opened in October, 1941, to the date the store was sold, May 25, 1944.

Mr. Collett: If the Court please, again counsel states it is a recap from daily sales, and I make the observation that the best record is the record of daily sales that they made the recap from, that is, some other record from which it is made. I am not going to object to it, but for whatever it might be [71] worth.

The Court: Is Exhibit 17 offered?

Mr. Grupp: Yes.

The Court: Admitted for what it is worth.

(Whereupon recap of daily sales of Joseph's, October, 1941, to May 25, 1944, was admitted into evidence as Plaintiff's Exhibit 17.)

Mr. Grupp: The group of documents which I will next offer are—what are they, Mr. Maroosis?

Mr. Maroosis: April, May, June, July, August, September, October, November.

Mr. Grupp: The group of memorandum sheets which we are next offering, your Honor, as plaintiff's exhibit next in order is a record of daily sales——

The Court: Just a minute. Record of daily sales?

Mr. Grupp: Record of daily sales from the date the store was opened.

The Court: From what date?

Mr. Grupp: That would be October, 1941. I don't remember the exact date.

The Court: All right, that was what date?

Mr. Grupp: That was the date of the taking of the inventory on April 31, 1944.

The Court: April 31?

Mr. Grupp: I am sorry, March 31. That is 1944. And in [72] offering these, and with reference to the missing documents, at a conference which was held yesterday afternoon in Mr. Collett's office we have been advised by some of the government men that early in January of this year they were present in Mr. Maroosis' office and examined these documents which now are offered as Plaintiff's Exhibit 18; that there were at that time in existence certain of the documents which are now found missing. We have offered, and make this offer at this time, that if the government men will testify

that they examined such documents and took notes from them and had their recaps of them, we will not object to their being introduced in evidence.

The Court: In other words, Exhibit 18 for identification has missing portions?

Mr. Grupp: As I understand from Mr. Maroosis—I think the records will bear this out—with the exception of one on November all of the 1943 records are missing.

The Court: All of 1943 except October and November are missing?

Mr. Grupp: That is right.

The Court: Any other portion of this period missing from October, 1941, to March 31, 1944?

Mr. Grupp: None that we know of.

The Court: All of 1943 except October and November is missing?

Mr. Grupp: That is right, and he states some of the dates [73] that are missing, the government men said they saw the books in Mr. Maroosis' possession and that they took an audit of them, or examined them, made notes from them, and we have offered that we can—that we knew they were in existence then and they have evidently been misplaced. We have made a search for them. I don't know whether Mr. Collett will have any objection to my making this statement. We do know that these books have been moved from Joseph's to the Fillmore Street store; that thereafter the records were again moved, and Plaintiff's Exhibit 18 constitutes the records which are considered perpetual

records in view of the fact that they are really notations of a clerk and a basis which Mr. Maroosis states was for him to check on clerks to determine the sales principally of bottled goods and don't in the main contain any reference to sale of case goods lots.

The Court: Then you are offering such in evidence?

Mr. Grupp: We are offering such in evidence, your Honor.

Mr. Collett: No objection.

The Court: Exhibit 18 is admitted for what it is worth.

(Whereupon memorandum sheets, October, 1941, to March 31, 1944, were admitted into evidence as Plaintiff's Exhibit 18.)

Mr. Collett: I might state that counsel may examine any witnesses he has to explain the answers of those books.

Mr. Grupp: We now offer as plaintiff's exhibit next in order a looseleaf binder containing sheets and explain that these [74] sheets report the daily perpetual inventory—no, report the daily sales, starting with April 3, the first date this store was opened under Mr. Maroosis' own management.

The Court: What year?

Mr. Grupp: 1944, through May 24, 1944, at which time—that was the last time the store was operated by Mr. Maroosis. We offer that in evidence.

The Court: May it be admitted?

Mr. Collett: Subject to the same reservation.

The Court: Yes. Exhibit 19 may be admitted for what it is worth.

(Whereupon looseleaf binder of daily sales, April 3, 1944, to May 24, 1944, was admitted into evidence as Plaintiff's Exhibit 19.)

Mr. Grupp: Mr. Maroosis points out these tapes are part of Plaintiff's Exhibit 18, and without these this book wouldn't make much sense.

The Court: In other words Exhibit 18 is admitted with added machine tape?

Mr. Grupp: Yes, sir. If you want to check these it will save us a lot of work.

Mr. Collett: This is the first time we have seen anything about these tapes, if the Court please.

The Court: The tapes will only be binding if they are accurate. [75]

Mr. Collett: That is true.

Mr. Grupp: They have been checked against the additions in the books. Now, if Mr. Collett will permit me, I would like to make this explanation to the Court again in an effort to expedite. As I understand, Plaintiff's Exhibit 18 is a recap of the daily sales of this store taken from the register of the store.

The Court: Let's see. You say Exhibit 18 is a recap of the record of daily sales—is that what you call it?

Mr. Grupp: I think we are muddled on this exhibit.

The Court: Exhibit 17 was stated to me as a recap of sales.

Mr. Grupp: That is correct. It is 17, your Honor. 17 is a recap of the daily sales of this store from the beginning of the operation of Joseph's by Mr. Maroosis and Mr. Kosloff through May 24, 1944, and contains a record of all the daily sales, and from that Plaintiff's Exhibit 17 the daily perpetual inventory represented by Plaintiff's Exhibit 15 and Plaintiff's Exhibit 16.

The Court: They were based on Exhibit 17, is that what you are telling me, Exhibits 15 and 16?

Mr. Grupp: That is right. The Plaintiff's Exhibits 18 and 19 were kept in the manner as represented by these loose individual books and bound periodically as part of Plaintiff's Exhibit 18 as just ordinary loose composition books, like, [76] except they are a little longer and in some instances the covers are torn on those books, and they are bound into the black volumes which are a portion of Plaintiff's Exhibit 18. Those records are notations by the clerk of individual sales as he makes them, with the exception that in most instances case goods were not listed thereon.

Mr. Collett: Just a moment, I don't want to get confused. You state that this inventory—this only begins March 25, of 1944, then goes after April 1, this so-called running inventory?

Mr. Grupp: That is right.

Mr. Collett: That is only from May 25—March 25—

The Court: I have got it March 31 to May 25.

Mr. Grupp: That is right, March 31 to May 25, is represented by Plaintiff's Exhibits 15 and 16.

Mr. Collett: But then you have put all this Exhibit 17 and stated that it was based upon this inventory, whereas these go back from March 31 all the way to November 1, a period which is not covered, and you don't have any of those for that period.

Mr. Grupp: Let me restate it, if I may. Plaintiff's Exhibit 17 is a recap of daily sales and goes clear back to the opening operation of this store. It includes a recap of sales.

The Court: Counsel, as I understand it, the contents of [77] that Exhibit 15 and Exhibit 16 are based on that portion of Exhibit 17 as is found between March 31 and May 25 in the year 1944?

Mr. Grupp: That is correct.

Mr. Collett: The only thing I don't understand is that the periods are entirely different. One is from April 1 to May 25 and the other prior to April 1.

The Court: No, one is from October, 1941, to May 25, 1944. That is stated to me. The other is only a few months of that period.

Mr. Grupp: That is right. October 17, according to the statement, covers the whole period, and exhibits 15 and 16 cover a small portion of that full period.

Mr. Grupp: That is right.

The Court: And the portion they cover is the portion merely beginning April 1.

Mr. Collett: That is correct.

The Court: All right.

Mr. Grupp: Will you take the stand?

NICK W. MAROOSIS

resumed the stand, previously sworn.

Direct Examination

(Continued)

By Mr. Grupp:

Q. Now, Mr. Maroosis, calling your attention to plaintiff's exhibit 18, I will ask you if those documents [78] or any of them form a part of your permanent bookkeeping records? A. No.

Q. Will you explain to the court just why they were kept?

A. The record was kept by the clerk. When the clerk made a sale of bottled whiskey he wrote down the sale and rang it into the cash register. At night the tape was taken from the cash register and the book checked from the tape of the cash register, and if the tape checked, the entry of the cash register plus any additional sales were put into a permanent record in the form of this exhibit.

Q. You are pointing to an exhibit? Is that this exhibit 17 you refer to? A. Yes, sir.

Q. Do the entries in plaintiff's exhibit 18 for any given day constitute the entire sales of the store on that given day?

A. In most cases it does.

Q. Does it include the case sales?

(Testimony of Nick W. Maroosis.)

A. In some cases it does not, and where there are case sales it wouldn't include large case sales.

Q. Incidentally, those records referring to plaintiff's exhibit 18, were they kept at your direction?

A. No.

Q. At whose direction were those kept?

A. That was the policy. [79]

The Court: Which exhibit wasn't kept at your direction? Exhibit 18?

Mr. Grupp: Exhibit 18, your Honor, yes.

A. It was the policy of the store, I mean the policy of doing business and checking merchandise.

Q. (By Mr. Grupp): Who was in charge of the store? A. Mr. Kosloff.

Q. He was in charge of that store from the opening date?

A. He was in charge of that store from the opening date of 1941 until April 1, 1944, at which time I took physical control of the store, on April 1, 1944.

The Court: He was in charge of the store from what date?

A. I believe it was October, 1941, until April 1, 1944, I believe.

The Court: How do you spell his name?

A. K-o-s-l-o-f-f.

Q. (By Mr. Grupp): Now, Mr. Maroosis, plaintiff's exhibits 15 and 16, were those kept under your direction? A. Yes, sir.

Q. Is that system a part of the same system you

(Testimony of Nick W. Maroosis.)

have always used in your store, now use in your other store? A. Yes.

Q. That is known as what?

A. The daily perpetual inventory system or control.

Q. I am going to hand you plaintiff's exhibit 16, in evidence, and I am also going to hand you plaintiff's exhibit 19 in [80] evidence. A. Yes, sir.

Q. Are either of these exhibits dependent upon the other?

The Court: 16 and 19?

Mr. Grupp: Yes.

A. Are they dependent upon each other?

Mr. Grupp: Yes.

A. Well, this is dependent on this.

Q. When you say "this," will you refer to the exhibit number?

A. Exhibit 16 is dependent upon the exhibit No. 19.

Q. All right, now will you explain to the Court just how that refers?

A. The sale is made here, for example—we will say that there are two bottles, fifths, of Three Rivers sold, and on during the day there are two more bottles sold, and later on there are two more bottles sold, and so forth.

Q. You are taking a given date?

A. Any day. Then at the end of the day these are totaled up, the Three Rivers would be totaled up by the girl in the office, and then she would turn to the book that has Three Rivers——

(Testimony of Nick W. Maroosis.)

Mr. Collett: Just a minute, so that we will understand this. Plaintiff's exhibit 16 has a page for every type of liquor or whiskey or any other liquor you have?

A. It has one sheet for everything in the store, including gum, candy, cigarettes, and everything.

Q. (By Mr. Grupp): Three Rivers Whiskey is on the sheet? A. Yes.

Q. You are referring to plaintiff's exhibit 19. When they find sales of Three Rivers on plaintiff's exhibit 19, they are entered here?

A. Entered and subtracted from the total inventory on exhibit 16. I can explain it better this way: If we have some merchandise—let's say in this particular instance Three Rivers, we had on hand on April 1, 1944, 3256 bottles, then on April 3 there were 46 bottles sold. If you will count the number of bottles sold on April 3 you will find a total number of 46. Then the girl subtracts 46 from 3256 and gets 3210, and on April 4 there were 13—

Q. (By Mr. Grupp): You can stop there. In other words, you can tell by looking at your perpetual inventory sheet the exact number of any given liquor at any given date?

A. That is correct.

Mr. Collett: If the Court please, I haven't objected, but I seriously question the materiality of all this as it is taking a good deal of time, and it is for this period of April 1. The records speak for themselves as to what he did.

(Testimony of Nick W. Maroosis.)

The Court: Of course I am anxious for you to get through, with proper concern for the interests of the respective clients. You can spend a lot of time that doesn't help either the client or me. [82]

Mr. Grupp: I think counsel will stipulate, your Honor, that the check which I now offer as plaintiff's exhibit next in order may be admitted.

The Court: Exhibit 20 is a check?

Mr. Grupp: For \$750, made payable to the State Board of Equalization, and is the check which paid the additional tax based on the state audit on 96.41 percentage of gross sales, being distilled spirits.

Mr. Collett: No objection.

The Court: Exhibit 20 is admitted.

(Whereupon check for \$750 was received in evidence and marked plaintiff's exhibit No. 20.)

Mr. Grupp: We now offer in evidence, and I don't think there will be any objection to this, as the next in order (that is, plaintiff's exhibit 21), which is a copy of the audit of the State Board of Equalization, and discloses the method in which they arrived at their calculation to the total amount of distilled spirits sold from July 1, 1943, to May 25, 1944, was 96.41 per cent of the gross sales of the store in question.

Mr. Collett: You are offering the document for evidence. The document speaks for itself. I object to counsel's statement as to what it might be. No objection to the document, it is to his statement as to what it might be.

(Testimony of Nick W. Maroosis.)

Mr. Grupp: I said it purported to be.

The Court: Exhibit 21 admitted. [83]

(Whereupon the audit of State Board of Equalization was received in evidence and marked Plaintiff's exhibit 21.)

Mr. Collett: If the Court please, I don't want to delay, but counsel has a whole bunch of correspondence here. I don't know why he is seeking to introduce all these documents. If there is any question about them, I want to save the time of the Court, but it is possible—offhand it doesn't seem to me they are particularly material.

The Court: Suppose we take a five-minute recess and you and counsel informally talk about them.

Mr. Collett: I would like to do that.

Mr. Grupp: I thought you had already seen these.

The Court: Court will be recessed for five minutes and you can talk about them as much as you please.

(Brief recess.)

The Court: Is this to be exhibit 22?

Mr. Grupp: I offer a letter of July 12, 1945, from Mr. Maroosis to the Alcohol Tax Unit, as plaintiff's exhibit 22, letter requesting appointment.

The Court: Any objection?

Mr. Collett: No objection.

The Court: Admitted.

(Testimony of Nick W. Maroosis.)

(Whereupon letter of 7/12/45, Maroosis to Alcohol Tax Unit, was received in evidence and marked plaintiff's exhibit No. 22.) [84]

Mr. Grupp: We next offer for identification, first, as plaintiff's exhibit 23, the reply of the Alcohol Tax Unit to Mr. Maroosis setting date for a conference.

(Whereupon letter of Alcohol Tax Unit to Mr. Maroosis was marked plaintiff's exhibit 23 for identification.)

The Court: Is there any objection?

Mr. Collett: No objection.

The Court: Admitted.

(Whereupon letter from Alcohol Tax Unit to Maroosis was received into evidence as plaintiff's exhibit 23.)

Mr. Grupp: We next offer in evidence as plaintiff's exhibit next in order, for identification, a letter from Mr. Maroosis to Mr. J. H. Maloney, who is district chief of the Alcohol Tax Unit, confirming.

The Court: No objection?

Mr. Collett: No objection.

Mr. Grupp: This letter confirms the appointment.

The Court: Exhibit 24 admitted.

(Whereupon letter from Maroosis to J. H. Maloney confirming appointment was admitted into evidence as plaintiff's exhibit 24.)

(Testimony of Nick W. Maroosis.)

Mr. Grupp: We next offer as plaintiff's exhibit next in order Mr. Maloney's reply confirming date of July 31, 1945, as the time for the appointment with Mr. Maroosis.

Mr. Collett: No objection. [85]

The Court: Exhibit 25 admitted.

(Whereupon letter from J. H. Maloney to Maroosis confirming date of appointment was admitted into evidence and marked plaintiff's exhibit 25.)

Mr. Grupp: We now offer in evidence a letter to the Alcohol Tax Unit with an inclosure therein, a copy of the audit of the State Board of Equalization, showing how the 96.41 figure was arrived at, dated November 9, 1945.

Mr. Collett: No objection.

The Court: Admitted.

(Whereupon letter of 11/9/45 to Alcohol Tax Unit was received in evidence and marked plaintiff's exhibit 26.)

The Court: This letter is from the State Board of Equalization?

Mr. Grupp: No, this letter is from Mr. Maroosis' accountant to the Alcohol Tax Unit inclosing for their examination the State Board of Equalization audit showing how the 96.41 percentage was arrived at. We next offer the letter from the Treasury Dept. to Mr. Maroosis dated February 15, 1949,

(Testimony of Nick W. Maroosis.)

rejecting his claim for refund which was made for this assessment now in question.

The Court: Exhibit 27 offered.

Mr. Collett: No objection.

The Court: Admitted.

(Whereupon letter of 2/15/49, Treasury Dept. to Maroosis, was admitted into evidence and marked plaintiff's exhibit 27.) [86]

Mr. Grupp: Incidentally, I note that on the back of plaintiff's exhibit 25 there are some penciled notations which I presume were not on the original, and I would like to question him.

Q. Mr. Maroosis, I hand you plaintiff's exhibit 25. I note some penciled notations on the back. Do you know whose handwriting that is?

A. It is my handwriting.

Q. Do you know when those notations were made?

A. The day following the appointment.

Q. The appointment referred to in that letter?

A. Yes, sir.

Q. When was that appointment, Mr. Maroosis?

A. I don't remember. Apparently August 7 at 3:00 o'clock.

Q. What year? A. 1945.

Q. Do those notations on the back recall to you who was present at that conference?

A. Yes, I was supposed to see a Mr. Colliton, but I have "Mr. Colliton not in." Apparently I

(Testimony of Nick W. Maroosis.)

saw Mr. Ed Ruark, and I have the notation that he was the senior inspector.

Q. You had a conference with him at that time?

A. Yes, sir.

Q. I will ask you this question, Mr. Maroosis: Were you at any time called into conference with the Alcohol Tax Unit [87] inspectors or examiners and physically you did not attend or refused to attend?

A. Never. I have never. They refused me several times to give me hearings, though.

Mr. Grupp: You may cross-examine. Oh, there is one other question:

Q. Mr. Maroosis, in plaintiff's exhibit 6, which has been identified as the Alcohol Tax Unit sales audit and basis of the sales assessment, which was subsequently changed, I note in that audit the following language, "Taxpayer's distilled spirits sales used his estimate of distilled spirits, being 86 per cent of total sales." A. Yes, sir.

Q. I will ask you if you ever gave that estimate to the inspectors.

A. Mr. Hedrick asked me——

Q. Just answer yes or no first. A. Yes.

Mr. Collett: Just a minute.

Mr. Grupp: I was reading from here, counsel (indicating). I read this language.

Q. Your answer was yes, was it, Mr. Maroosis?

A. Yes, sir.

Q. Well, do you know approximately when that was? A. No, I don't remember. [88]

(Testimony of Nick W. Maroosis.)

Q. Do you know to whom you made that estimate? A. To Mr. Hedrick.

Q. It was before, however, this first assessment was levied against you, was it? A. Yes, sir.

Q. Do you know who was present besides Mr. Hedrick and yourself at that time?

A. No, I don't.

Q. Where did that conversation take place?

A. I believe it was at California and Fillmore.

Q. Will you tell the Court what you said at that time?

A. Mr. Hedrick asked me what I thought the percentages would be of distilled spirits on 451 gallons, and I told him I didn't know, however, I thought it would be somewhere around 86 per cent, because that is what the State Board determined for audit prior to the time I told him.

Q. In other words, your 86 estimate was based on a prior audit by the State Board of Equalization?

A. Yes.

Q. Did you give that figure to Mr. Hedrick?

A. I did, yes, sir.

Q. Now, after you received the audit from the State Board of Equalization, which is attached to plaintiff's exhibit 9, which changed that figure from 86 to 96.41, did you communicate that information to Mr. Hedrick? [89] A. Yes, sir.

Q. How did you so communicate that information?

A. Well, I believe that we had a meeting after that down at their office on Battery Street, 535 Bat-

(Testimony of Nick W. Maroosis.)

tery, or somewhere down there, and I so advised them, along with my accountant, that those were now the facts and they refused to acknowledge them at all.

Q. Who is F. T. Andrews Company?

A. They are a firm of accountants.

Q. I notice on November 9, 1945, F. T. Andrews Company wrote (plaintiff's exhibit 26) a letter to the Alcohol Tax Unit advising them:

“Gentlemen:

“Inclosed is a copy of letter addressed to Mr. Maroosis and Mr. Kosloff from the State Board of Equalization, together with copy of audit of retail package sales, distilled spirits——”

Was that letter sent after your conversation with Mr. Hedrick? A. Yes.

Mr. Grupp: You may cross-examine.

Cross-Examination

By Mr. Collett:

Q. You stated—exhibit 1, please——

Mr. Grupp: Pardon me, counsel, I do want to make this statement. We are sort of negotiating on a certain stipulation, your Honor, with reference to certain figures here, and [90] I have refrained in my direct examination of Mr. Maroosis from going into the questions which are not subject of that stipulation. Might it be understood if that stipulation is not signed—we are now considering it—that I may question this witness further on this

(Testimony of Nick W. Maroosis.)

matter referred to in that stipulation if it isn't agreed upon?

Mr. Collett: Well, I think we had better conclude that matter. This stipulation was presented to me in this form, if the Court please, just before the Court was in session, and it is a penciled notation preparation, but there are a couple of matters——

The Court: You may look at it. In other words, the Court is at ease, which means you counsel may talk to each other and there will be no part of it in the record and the reporter will keep no notes of what is said.

(Discussion of counsel off the record.)

The Court: All right, we are back on the record.

Mr. Grupp: Your Honor, I would like to offer a stipulation between respective counsel for the parties in this action, entered into in writing, and I would like to read the stipulation into the record.

The Court: I don't know why if you have it. Why not just file it?

Mr. Grupp: I did want to file it.

The Court: It is filed as part of the trial. [91]

Mr. Grupp: Thank you.

The Court: Stipulation agreed to and admitted.

Mr. Grupp: I will ask counsel—and I will finish in one more moment—as I walked over to the counsel table a moment ago I found one of my exhibits which I intended to offer and didn't. I do want to offer for identification at this time this

(Testimony of Nick W. Maroosis.)

file—this was among your papers, Mr. Collett, but I know I left it there. I will have the witness identify it. It is being offered as exhibit 28.

(Whereupon document was marked plaintiff's exhibit 28 for identification.)

Q. (By Mr. Grupp): Mr. Maroosis, this file, which is plaintiff's exhibit 28 for identification, can you explain what that file purports to be?

A. Well, when the state made our audit and assessed us for an additional \$750 I instructed my accountant to start checking, and she took every bottle that was sold from the period in question and checked it and found the percentages that the State Board had arrived at to be reasonably correct.

Q. And the tax which was paid, the \$750 check, plaintiff's exhibit 20 in evidence, was that paid subsequent to that audit? A. Yes, sir.

Mr. Grupp: Now I think I have finished.

Mr. Collett: Aren't you going to offer it?

Mr. Grupp: I offer it. [92]

Mr. Collett: If I may examine the witness on voir dire?

The Court: You may.

Q. (By Mr. Collett): Mr. Maroosis, this check of Mrs. Woodward you say is a check on every bottle? A. That is correct.

Q. For what period?

A. For the period in question there.

Q. Well, from here can you tell what period is in question?

(Testimony of Nick W. Maroosis.)

A. I think the period that was in question was January—was July 1, 1944, until May 25 when the store closed.

The Court: July 1, 1944?

A. July 1, 1944, yes, sir, until May 25, 1945.

Mr. Grupp: I think the record shows it was 1943, your Honor.

A. 1943, excuse me, that is right. What's the matter with me?

Q. (By Mr. Collett): This is a bottle by bottle check from July 1, 1943, to May 25, 1944, you said, is that right? A. Yes, sir.

Q. Will you show me where there is a bottle by check for the month of December, 1943?

A. I have to get the rest of the records, the rest of the sheets. I mean, what they do—let me explain.

Q. Just look at all the exhibits, and if you will show me from where you get the bottle by bottle check in December, 1943.

A. It is very simple: Here it says whiskey first, 1, 44— [93] meaning 1/1/44 to 3/31/44, and if you will look at it, evidently on one day you will find of the three months' period—sold 13 bottles of Johnny Walker during 1944, total 56 bottles of Johnny Walker—

The Court: Just a minute, we are spending a lot of time.

A. It is very simple. It explains itself.

The Court: Just read that question, Mr. Reporter.

(Testimony of Nick W. Maroosis.)

(Question read by the reporter.)

A. Yes, sir. If counsel will please count the number of bottles of Johnny Walker.

Mr. Collett: If the Court please, this is January to March, 1944.

A. That is what this is.

Mr. Collett: I submit, if the Court please, the witness be instructed to answer the question.

The Court: I am told something is very simple. It is indicated to me now it is very simple if I want to count all the bottled goods—a tremendous effort. Offhand that doesn't appear simple to me.

Mr. Grupp: I think, for the period it covers, your Honor.

The Court: If that is a fact it is very simple, he should be able to show in that particular check sheet what applies to December of——

Mr. Grupp: I think the witness is mistaken in the dates, your Honor. [94]

The Court: ——of 1943, rather than to tell counsel if he will look at all the other files and check through and count bottles he will find what he did was right.

Mr. Grupp: Your Honor, I think the last exhibit offered——

Mr. Collett: If the Court please, the witness was asked a question and I would like to have the witness testify, not counsel.

The Court: Yes. If the witness can point out—I mean, the Court ultimately has to be helped. If

(Testimony of Nick W. Maroosis.)

the witness can point out in this exhibit for identification, No. 28, where it shows what bottles were sold in December, 1943, I would like to have him do it.

A. This is not 1943, it is from 1/44 on to 7/31/44. This is a subsequent period to determine the percentage of distilled spirits.

The Court: I was told a while ago it was from July 1, 1943. Now you tell me it doesn't include that.

A. No, it doesn't.

Q. What does it include?

A. It includes the period from January 1, 1944, until March 31, 1944, inclusive.

Mr. Collett: I object to its introduction in evidence on the ground it is irrelevant and immaterial, doesn't cover the period which the witness stated it would cover, and offers nothing to the Court by way of evidence. [95]

Mr. Grupp: Your Honor, I think possibly the mistake is mine. I did get a little confused as to the dates. I would like to make the offer again. I suggest counsel's objection at this time be sustained so that the record will be kept straight.

The Court: All right, objection sustained.

Direct Examination
(Continued)

By Mr. Grupp:

Q. Mr. Maroosis, in checking the State Board audit, can you explain to the Court just what steps

(Testimony of Nick W. Maroosis.)

were taken by you or your accountants under your direction to check the State Board audit?

A. Yes, sir.

Q. Of July 1, 1943, to May 25, 1944.

A. Yes, sir.

Mr. Collett: If the Court please, I object to the question. He has already been asked and has answered that the Board—that the bottle by bottle check was made by his accountant at the time, Mrs. Woodward, and he testified it covered the period from July 1, 1943, to May 25, 1944, and there was a confirming audit made by the State of California covering the same period.

The Court: I recognize that. He also stated at the beginning and insisted for a while that it covered the period from July 1, 1943, to May, 1945; but he has corrected that, and the Court have to keep something out because the witness was too certain and mistakenly certain. Objection overruled. [96]

Q. (By Mr. Grupp): Let me ask you the question, what steps were taken?

A. I immediately asked Mrs. Woodward to check the audit and percentages, and she went through the same steps that the State Board of Equalization went through, meaning she checked the purchases as against the sales, and that is inclusive of beer, wine, tobacco, and other merchandise other than distilled spirits. Then for further and conclusive evidence and proof, she took the period from Janu-

(Testimony of Nick W. Maroosis.)

ary 1, 1944, until March 31, 1944, and took the entire breakdown, which includes every package of cigarettes and every bottle of beer and everything that was sold in the store for that entire period.

Q. When you say "entire period," so we won't have that misunderstanding again——

A. January 1, 1944, until March 31, 1944.

Mr. Collett: If the Court please, I don't want to be confused myself. We have language that is used here referring to "entire period." The entire period——

The Court: He has made that clear. It is the entire three-month period.

Mr. Collett: My point is that the entire period in question is the period July 1, 1943, to May 25, 1944.

The Court: I realize that. The entire period that she checked is only a portion of the entire period of the State's audit. I recognize that. It is a fraction. [97]

Q. (By Mr. Grupp): Mr. Maroosis, the audit, or this check which you explained, was done by Mrs. Woodward where every item in the store was sold—every item in the store sold was checked and a computation reached as to percentage of gross distilled spirits, was that represented by plaintiff's exhibit 28 for the three-month period?

A. Yes.

Q. As to the period from July 1, 1943, through May 25, 1944—that is up to the date it was sold,

(Testimony of Nick W. Maroosis.)

now—was there any other audit done than this, or any other check?

A. Yes, they checked the purchases against the sales.

Q. Checked all the purchases against the sales?

A. Yes, sir.

Q. And in doing that—I hand you plaintiff's exhibit 21. Will you identify that? What is plaintiff's exhibit 21?

A. This is the check for the period 6/30/43.

Mr. Collett: I object. That document is in evidence and speaks for itself.

The Court: It is the copy of the audit of the State Board of Equalization, is what is was offered as.

Mr. Grupp: That is right. That is the check that was made against it.

Mr. Collett: He hasn't testified to that.

Q. (By Mr. Grupp): If you remember——

Mr. Collett: The document speaks for itself. It is in [98] evidence.

Q. (By Mr. Grupp): Mr. Maroosis, at the time Mrs. Woodward checked for the entire period, did she check against the audit of the State Board of Equalization? A. Yes, sir.

Q. Is it exhibit 21? A. Yes, sir.

Q. This period, then, was a recheck of the period? A. Yes.

Mr. Grupp: We will reoffer plaintiff's exhibit 28 as plaintiff's exhibit next in order.

(Testimony of Nick W. Maroosis.)

Mr. Collett: May I have one question on voir dire?

The Court: All right.

Q. (By Mr. Collett): Mr. Maroosis, did Mrs. Woodward examine the same records that were made available to the State Board of Equalization?

A. Naturally.

Q. Were there any other records made available to the State Board of Equalization?

A. All the records were made available to the State Board of Equalization.

Q. All the records? And the records that were made available to the State Board of Equalization, did they include the daily sales sheets for December of 1943, July of 1943, August of 1943, and September of 1943? [99]

A. I imagine so.

Q. Did they or did they not?

A. I don't know. I said I imagine so.

Q. Why don't you know?

Mr. Grupp: We will submit that question is argumentative.

The Court: It is cross-examination. Overruled. You may answer.

A. I already answered it. I imagine so, as the records were there and they had them available. That is five years ago, or four years ago, your Honor. There is no reason why they shouldn't have been examined. There would be no reason why they wouldn't be. We have the most efficient record system in the United States of any liquor store.

(Testimony of Nick W. Maroosis.)

Q. (By Mr. Collett): Mr. Maroosis, did Mrs. Woodward, in the calculation of this check, have available to her the daily sales sheet for the month of December, 1943, months of September, August, July?

A. Right here are the ones she checked. They are right there (indicating).

Q. They are? The only records she checked are there, and the only ones the State Board of Equalization checked?

A. She checked them all. I said she checked the same sheets as the State Board, as of purchases against sales. She took a further check.

Mr. Collett: I don't believe my question is very difficult. The witness has shown a very meticulous and detailed knowledge of the process whereby he started to conduct his bookkeeping from April 1. He has indicated a detailed familiarity with the bottle by bottle sales from January 1 to March 31, 1944. Now when we come to that period in which he doesn't have the books, he knows whether books, whether those books were checked, and I believe——

A. Your Honor, those were not permanent records.

Mr. Grupp: Just a minute.

The Court: Just a minute, Mr. Plaintiff, you are not to make any statement except if you are asked a specific question.

A. Yes, sir.

(Testimony of Nick W. Maroosis.)

The Court: Your volunteered expression might be stricken out.

Mr. Grupp: Your Honor, I would point out to the Court that in the questions and in the manner of questioning counsel has engaged in suppositions and assumed something not in evidence.

The Court: The questions of counsel for the defendant were entirely proper.

Mr. Grupp: Might I point out that the audit which is in evidence here of the State Board of Equalization did not purport and does not purport to be an audit of item by item sales of this establishment. It is an audit of purchases, as [101] the witness testified, against sales and does not intend—we do not intend to convey to the Court that the State Board of Equalization in its audit conducted a minute, detailed study of every item sold.

The Court: Well, just a moment. I am interested in one thing. There was an expression, I think yesterday morning, that apparently conveyed a meaning, but it was very close to an expression. I will ask the witness now, where is Mrs. Woodward?

A. She has had a change of life, your Honor. The woman is not well.

The Court: Well, where is she?

A. I do not know. The last time I heard she was in a——

Mr. Grupp (Interposing): I can ascertain that.

The Court: Just a moment. Answer is, the last time you heard——

(Testimony of Nick W. Maroosis.)

A. Her husband told me that apparently they had to put her in an institution.

The Court: Exhibit 28 is offered. I am not too sure that it will be any help to me. It will be admitted for what it is worth. If exhibit 28 is only to be of help to me if I have to go through all the records, of course I will pay no attention to it. If I can go through all the records and arrive at exhibit 28, and only arrive at exhibit 28 by going through all the records, I will do it independently. Exhibit 28 is admitted for what it is worth, if anything. Objection overruled. [102]

(Whereupon document previously marked for identification was admitted into evidence as plaintiff's exhibit No. 28.)

The Court: Any further direct examination?

Mr. Grupp: No further direct examination.

The Court: All right, cross-examine.

Cross-Examination

By Mr. Collett:

Q. Mr. Maroosis, daily sales sheet for January 1 to March 31 which you have referred to that Mrs. Woodward made, the bottle by bottle check, can you tell me the total sales as shown on the three months on that? A. Yes, sir, I believe I can.

Q. What is it, Mr. Maroosis? A. \$9440.61.

The Court: Total sales of what? Everything?

A. I don't know, your Honor.

(Testimony of Nick W. Maroosis.)

The Court: The total sales, \$9,000 what? What was that figure you gave me?

A. I am not sure, your Honor. No, I don't believe that is the total, no, that is not the total, your Honor. That is the total from February 25 on. I don't have the total for that. I can get it out of the other exhibit, I believe.

Q. (By Mr. Collett): Have you anything, any tape or any addition on the daily sales which you stated Mrs. Woodward ran a bottle to bottle check on, showing the total value—the total sum of your sales during the period January 1 to March 31?

A. Yes, sir; if you give me the balance of the exhibits, the one that was just introduced.

The Court: You mean exhibit 28?

A. The last exhibit. Thank you. The total in whiskey sales for that period was \$24,525.44. The total sales for gin in that period was \$1243.80. The total sales for brandy for that period was \$1572.50. The total sales of liqueurs for that period was \$1156.83. The total sales of rum for that period was \$5244.32. The total sales of wine for that period was \$1430.48. The total sales of beer for the three months was \$112.94. The total sales for miscellaneous, which includes all the other items in the store—cigarettes, and so forth, was \$284.62.

The Court: What was the total?

A. I don't know, your Honor.

The Court: What was the amount of the whiskey sales again?

(Testimony of Nick W. Maroosis.)

A. The total amount of the whiskey sales?

The Court: This is for three months.

A. \$24,525.44.

Mr. Collett: Can we pause a moment and add that, if your Honor please? \$36,570.93. Is there any question about that figure?

Mr. Schiller: I got \$36,510.93.

The Court: Well, we have had two different additions and [104] two different adders.

Mr. Collett: Will you read that figure again?

The Court: Well, just a moment. We are spending an awful lot of time and can spend an awful lot of time more if we are going to make an arithmetic problem out of this.

Mr. Collett: It is only a small difference in the figure. I possibly missed a few.

The Court: Let me see the book.

A. Yes, sir.

The Court: Whiskey sales, \$24,525.49; gin, \$1143.80; brandy, \$1572.50; liqueurs, \$1136.83; rum, \$5244.32; wine, \$1430.48; beer, \$112.94; miscellaneous, \$284.62. Those are the figures I have read from the typed sheets. How much more evidence do you expect to put in in your case in chief?

Mr. Grupp: I just have one accountant, your Honor, to substantiate the State Board of Equalization's figures, chiefly.

The Court: Counsel, may I speak off the record?

Mr. Grupp: Yes, sir.

Mr. Collett: Yes, sir.

The Court: You may put this down, but what

(Testimony of Nick W. Maroosis.)

I am going to suggest is that we have a very brief, informal mid-trial conference where nobody is bound. I am doing this intentionally so that you do not have to be technical and careful of what you say, but I am hoping I may arrive at what you counsel think the real issue is. You will not be bound by it, then when we go [105] back on record there will be no mention made of this except as counsel agree a synopsis should be made. Is that satisfactory?

Mr. Grupp: Yes, I think this will assist us materially.

The Court: Well, that is enough. Are you satisfied?

Mr. Collett: Yes.

The Court: We are off the record.

(Discussion off the record.)

The Court: On the record.

Mr. Grupp: I now at this time withdraw Mr. Maroosis and proceed to put on the accountant, without in any way limiting the defense of further cross-examination of Mr. Maroosis.

The Court: Mr. Maroosis may be temporarily withdrawn, and it will be understood he will be subject to cross-examination later.

(Witness excused.)

Mr. Grupp: I think if we had another short recess I could talk to the accountant and I could shorten his examination very materially.

The Court: All right. About time for an after-

noon recess, anyway. We will have one of ten minutes. We are at recess.

(Recess.)

The Court: All right, call your witness. [106]

JAY BRUCH

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court, please? A. Jay Bruch.

Mr. Collett: Directing my attention to the Court's remarks off the record, I would like to go off the record.

The Court: All right, we may go off the record.

(Discussion off the record.)

The Court: Now we are back on the record.

The Witness: I understand I may refer to my working papers in connection with answering any questions that relate to figures?

The Court: I don't know yet what the questions will be.

Direct Examination

By Mr. Grupp:

Q. Mr. Bruch, what is your profession or occupation?

A. I am a certified public accountant and a partner of the firm of John F. Forbes & Company.

Q. Where did you take your degree in accounting, Mr. Bruch?

(Testimony of Jay Bruch.)

A. I received my degree in New York State in 1929, and by reciprocity have also received a C.P.A. certificate in the State of California.

Q. Were you admitted as a certified public accountant in the State of New York?

A. Yes, in 1929. [107]

Q. When were you admitted in the State of California? A. In 1946, I believe.

Q. And John F. Forbes & Company, do they have offices in San Francisco?

A. Yes, they do.

Q. And elsewhere?

A. Yes. They also have offices in Seattle, Los Angeles, Chicago and New York City.

Mr. Collett: Satisfied with the witness' qualifications, if the Court please.

Mr. Grupp: Now, Mr. Bruch, when were you first employed by Mr. Maroosis?

A. In February of 1948.

Q. Was that employment directly in relation to the assessment in question in this action?

A. No, it was not. It was in connection with an income tax matter.

Q. Subsequently on from 1948 in connection with that income tax matter, did you subsequently do any work for Mr. Maroosis as a C.P.A. with reference to the assessment in question in this case?

A. Yes, I did.

Q. And in the course of that work did you

(Testimony of Jay Bruch.)

examine the records of Mr. Maroosis?

A. Yes, I did. [108]

Q. Can you explain to the Court, as briefly as you can, what type of bookkeeping system Mr. Maroosis has?

Mr. Collett: I object to the question, it is ambiguous as to what he means.

The Court: Overruled.

A. Mr. Maroosis keeps what is known as a double entry set of books and records, and in my opinion they are a complete set of books which are properly kept and——

Mr. Collett: Well, I object and request the latter part of the witness' answer be stricken.

The Court: Overruled. He is merely stating it as his opinion.

Q. (By Mr. Grupp): Mr. Bruch, in examining Mr. Maroosis' records can you, by the examination of your records, determine from the records, his permanent records, his purchases, his sales, his inventory as of a given period, and so forth, such information? A. Yes, I can.

Q. You can determine that?

A. I can determine that from an examination of his records.

Q. You are familiar with the government assessment in this matter, are you? A. Yes, I am.

Q. You examined it, did you?

A. Yes, I did. [109]

(Testimony of Jay Bruch.)

Q. Did you check that assessment?

A. Yes, we did have occasion to check the assessment in connection with the filing of a refund claim on behalf of Mr. Maroosis.

Q. I will hand you plaintiff's exhibit 9, which is entitled a claim, and consists of several sheets, possibly 15 or more. Is that the claim you refer to?

A. Yes, it is.

Q. Was that prepared by your office?

A. Yes, it was.

Q. In checking the government assessment in this instance, can you explain to the Court what you did to check that assessment?

A. We did several things. First of all we took the inventory figure, which was furnished to Mr. Maroosis as of May 2, 1944, expressed in terms of proof gallons, and followed the reconciliation of that inventory back to April 1, 1944, as——

Q. Might I interrupt?

A. ——furnished to Mr. Maroosis by a representative of the Alcohol Tax Unit.

Q. Mr. Bruch, you mentioned a May 2 inventory? A. That is right.

Q. Do you know who took that inventory, the May 2 inventory?

A. According to the information furnished to us, it was taken by a representative of the Alcohol Tax Unit.

Q. That was checked back to April 1 in what manner? [110]

(Testimony of Jay Bruch.)

A. We followed the computations that were made by a representative of the Alcohol Tax Unit, and I believe that is in evidence here as an exhibit, and that showed an over-declaration of 108.97 proof gallons. Then we also questioned Mr. Maroosis as to why there would be an overstatement of that amount over such a short period, and he explained to us that the inventory as of May 2, 1944, which the representative of the A.T.U. had used, did not include 60 cases of Three Rivers whiskey which was stored at 499 Haight Street.

We then compared the number of proof gallons which would be represented by this 60 cases and found it to be 123.84 proof gallons; and if the calculations of the Alcohol Tax Unit was adjusted to that effect, to that additional quantity, it would have resulted in an understatement of 14.87 proof gallons rather than an overstatement of 108.97 proof gallons. After reducing this to 14.87 proof gallons, we were satisfied in our minds that the inventory as declared on April 1, 1944, was substantially correct.

Q. At this point, Mr. Bruch, in the stipulation which was filed before the Court today, a part of that stipulation provides that it was the consensus of opinion of the C.P.A.s of the State Board of Equalization and investigator of the Alcohol Tax Unit that a percentage calculation in which there is an apparent understatement or overstatement of approximately one per cent of the proof gallons purchased and sold during a given [111] inventory

(Testimony of Jay Bruch.)

is sufficient to confirm the physical inventory. That was your opinion as well as the opinion of the Alcohol Tax Unit investigators? A. It was.

Q. So that when you refer to the percentage calculations, Mr. Bruch, just what do you refer to which might result in this one per cent error, which is nevertheless considered accurate?

A. It was referring specifically to the figures which appeared in that stipulation.

Q. I am referring to, just generally, what you consider is a percentage calculation.

A. A percentage calculation, if I understand you correctly, would be the amount by which your difference compared with the volume which is passed through the account, is computed to be approximately one per cent.

The Court: Counsel, if you have this covered by the stipulation, why cover it here?

Mr. Grupp: I tried merely to ascertain whether or not the May 2 inventory, when checked back, was also put on a percentage computation.

Q. (By Mr. Grupp): So far as purchases and sales from April 1 to May 2 is concerned, that was done by the same type of percentage calculation, was it not?

A. No, the percentages were not used in that second computation. That was based on actual inventory taken on May 2, 1944, the [112] purchases and the actual proof gallons——

Q. I see.

(Testimony of Jay Bruch.)

A. —and it wasn't necessary to resort to the use of percentages.

Q. I see. Now, in investigating the government figures were you able to determine what the Alcohol Tax Unit considered a reasonable gross profit or markup on the sale of distilled spirits?

A. Well, on the basis of the reports of the Alcohol Tax Unit, they would figure a $33\frac{1}{3}$ markup or a 25 per cent gross profit on the basis of the selling price.

Q. Taking into consideration Mr. Maroosis' return to the government as of May 1, 1943—1944, based on the April 1 physical inventory taken by him—strike that, please.

Did you, Mr. Bruch, check the gross profit made by Mr. Maroosis during the year 1943?

A. I did.

Q. And did you come to a determination of what his gross profit was during that time?

A. Yes, I did. According to his books and records his gross profit for the current year 1943 figured 27.87 per cent.

Q. And did you also determine from your examination his gross profits for 1944?

A. I did for the period from January 1, 1944, to March 31, 1944. According to his books and records his gross profit figures [113] 25.89 per cent, and that profit is based upon the inventory on which he made his declaration as of April 1, 1944.

Q. Do I understand correctly that in determin-

(Testimony of Jay Bruch.)

ing that gross profit you took his dollar value of his inventory of April 1, 1944, as forming the basis of his return to the government, into consideration when you computed his gross profit of that year?

A. Yes, that is correct.

Q. Did you in checking the government assessment give effect to the increased value of the inventory based on the government assessment to determine what Mr. Maroosis' gross profit would be if he had the inventory claimed by the government in its assessment?

A. I did; and if the inventory were increased by the amount claimed in the assessment it would have resulted in a gross profit of 47.33 per cent on sales as compared to 25.89 per cent, according to his books, for the period from January 1, 1944, to March 31, 1944.

Q. Now, as an accountant, in determining the gross profit according to Mr. Maroosis' inventory as taken by him on April 1, and in determining what his gross profit would be if you relied upon the government assessed inventory as of April 1, 1944, what conclusion do you reach from the figures of 25.89 per cent as against 47.33 per cent?

A. It would be—— [114]

Mr. Collett: Well, if the Court please, I object to that. What conclusion about what? The question is ambiguous.

The Court: I think I will sustain the objection on the ground that his conclusion would not be ad-

(Testimony of Jay Bruch.)

missible. You are making that objection, are you?

Mr. Collett: I will object, incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

The Court: That is the particular matter involved in the question.

Q. (By Mr. Grupp): Mr. Bruch, you included as part of the claim which you prepared for Mr. Maroosis, plaintiff's exhibit 9—you included in that claim when you filed it with the government a copy of the audit or determination of the State Board of Equalization showing the percentage of distilled liquor sales as against gross sales for the period July 1st, 1943, to May 25th, 1944, did you not? I say, that was included in there?

A. Yes, it was.

Q. Incidentally, did you cause to be checked—did you cause an audit of the State Board of Equalization audit to be made, or comparison, to determine the correctness of that audit in the determination reached by the State Board?

A. Yes, we did review the method by which the State Board of Equalization arrived at the 96.41 per cent percentage of distilled spirits sales, and the computations appeared in order and, in our opinion, were substantially correct. [115]

Mr. Collett: I object to that conclusion and move to strike the answer on the ground it wasn't responsive to the question. The question was, did he cause an audit to be made.

(Testimony of Jay Bruch.)

The Court: I think I will strike all the balance.

Mr. Grupp: All right.

Q. Did you reach a determination, Mr. Bruch, by a check of the figures of the State audit, to determine the correctness?

The Court: You may answer yes or no.

A. Yes.

Q. (By Mr. Grupp): And did you find—what was your determination?

A. Our determination——

Mr. Collett: I object to the question as being ambiguous.

The Court: Well——

Mr. Collett: I don't know where he is going with this.

The Court: Well, there is this, counsel: this question, of course, is a question that ultimately has to be determined by me and I would have the privilege of declining to hear it upon the ground that he is advising me what my conclusion should be. But I will overrule it. If I am going to allow the government men to give their opinion as to where something was going, it will be a double-bitted axe and will work both ways. Objection overruled.

Q. (By Mr. Grupp): Will you answer the question?

A. I arrived at the opinion that the State Board of Equalization computation would fairly represent the percentage of distilled [116] spirits sales for the period covered by their check.

(Testimony of Jay Bruch.)

Mr. Grupp: I will say this, my associate calls my attention to a summary of the audit of the State Board which may be of assistance to the Court and counsel. However, since it is only a summary of it, it may be objectionable, and if you have objections I will withdraw my offer. I thought it might be of assistance as prepared by the accountants of the State Board.

Mr. Collett: Are you offering this for identification?

Mr. Grupp: I want you to examine it. I have another to offer for identification. I am giving you that copy so that you may have it. We offer that as plaintiff's exhibit next in order, for identification.

(A document was marked plaintiff's exhibit 29 for identification.)

Q. (By Mr. Grupp): Mr. Bruch, I am handing you plaintiff's exhibit 29, for identification, and without telling us what the document contains, will you just explain what that document purports to represent, without reading anything from it?

A. It purports to represent a summarization of figures from the State Board, from the audit by the State Board of Equalization, and shows how the figure of 96.41 per cent was specifically computed.

Mr. Grupp: I will offer that in evidence as such a summary, and, as I say, if counsel has any objection I won't urge the offer. [117]

Mr. Collett: The audit is in, if the Court please, as the best evidence; it speaks for itself.

(Testimony of Jay Bruch.)

The Court: Counsel, in spite of the modesty of plaintiff's counsel, I will overrule the objection and exhibit 29 will be admitted as an offer to the Court of plaintiff's theory. In other words, it might be called a sort of crystallized argument, and you will be given the opportunity and privilege of doing the same thing if you want to. It isn't evidence of anything except that it is correct. If we stopped here I would allow counsel in argument to hand that to me and say it was part of his argument and I am allowing it for that purpose.

(Summary of figures of the State Board of Equalization was admitted into evidence as plaintiff's exhibit 29.)

Mr. Grupp: You may cross-examine.

Cross-Examination

By Mr. Collett:

Q. Mr. Bruch, you stated you were first employed by Mr. Maroosis in February, 1948?

A. That is correct.

Q. Prior to that time you didn't know the gentleman?

A. That is right.

Q. The books you checked, did they include the daily sales sheets for December, 1943, or January, February, March, April, May, June, July, August and September, 1943?

A. I did not have——

Q. The question requires a yes or no answer——

(Testimony of Jay Bruch.)

Mr. Collett: —and I will ask your Honor to so instruct the witness.

The Court: Read the question to the witness.

(Question read.)

A. They didn't.

Q. (By Mr. Collett): You have never seen those books?

A. Not to the best of my recollection.

Q. Well, you know whether you did or not.

A. It would be difficult to say definitely whether I had or had not seen them for the reason that they cover a long period of time. I did not have any particular occasion.

Mr. Collett: I will ask that be stricken as not responsive.

Mr. Grupp: I think it is responsive. The question calls for an explanation.

The Court: Let's see what the question was.

(Question read.)

The Court: He may say he doesn't think so. If that is his answer, it wouldn't require a long answer. Is that your answer, you don't think you did, that is enough?

A. I do not think I saw those books.

Mr. Collett: I suggest these be given the exhibit number A, B, C, D, F.

The Court: Yes, I will suggest the clerk, where there is a number of documents in one exhibit, you endorse on the exhibit A, B, C, and so forth, with

(Testimony of Jay Bruch.)

the number. What is the number of that? [119]

Mr. Collett: This is number 18.

The Court: Then it should be 18-A, B, C, so that if they are separated they will get back into the proper group. You don't need to do it now.

Mr. Collett: May we designate this one, then as A?

The Court: Since it is inside you might name it 18-B. I am not going to charge the clerk with the obligation of being chronologically correct in the lettering of a certain exhibit. All he is to do is to show what group the complex exhibit is composed of.

Mr. Grupp: They are not composed as to date?

The Court: No, he is not charged with that. I am not telling him not to. All right, you may proceed.

Q. (By Mr. Collett): Mr. Bruch, I show you plaintiff's exhibit 18-B, which states on the front "Daily perpetual inventory, 4588 Geary, 1st quarter, 1944, January, February, March," and I will ask you if you have seen a similar book or document as to the month of December, 1943?

A. I have not.

Q. Would your answer be the same for the months of January, February, March, April, May, June, July, August and September, 1943?

A. I could not answer that definitely yes or no because at the time I was shown a bunch of books of the same nature, and I did not have occasion to

(Testimony of Jay Bruch.)

go through them to determine which months [120] were there and which months were missing, so I could not say for a certainty whether I had seen those other months or had not seen them.

Q. In your various computations with regard to the matter of the assessment which is involved in this case, you relied upon the plaintiff's books and the information therein contained exclusively, is that so?

A. No, that is not so, because——

Q. What was it?

A. No, that is not so.

Q. What else did you rely upon?

A. We relied upon the inventory which was taken by the Alcohol Tax Unit on May 2nd, 1944. We also relied upon the percentage of distilled spirits sales which were shown by the State Board of Equalization audit, which was attached to the refund claim.

Q. What is that figure? A. 96.41 per cent.

Q. You relied upon it? You mean in making your audit or your inspection of the books you relied upon the figure before you inspected the books?

A. No, that is not what I said. As I understood your question, you asked me whether in the preparation of the refund claim we resorted to anything other than the books and records and it was in connection with the preparation of the claim that we resorted [121] to the use of the Board of Equalization audit which revealed the 96.41 per cent as being distilled spirits sales.

(Testimony of Jay Bruch.)

Q. Mr. Bruch, the figure of \$5,912.24 which is on plaintiff's exhibit 29 and is taken from the State audit—what is the number of that? It is eleven, isn't it?—Well, it doesn't make any difference. It is shown as \$5,912.24. How was that figure determined? Where did they get that figure?

A. I do not know where they secured that figure.

Q. Did you confirm the figure?

A. I did not confirm that figure.

Q. You don't know where they got the figure?

A. I do not know where they got the particular figure.

Q. Well, what did you check when your attention was called to the State Board of Equalization audit?

A. I reviewed the method which they followed in arriving at the 96.41 per cent.

Q. In other words, you merely reviewed the manner in which they computed, rather than the method by which they obtained the figure, is that it?

A. I think that is a choice between words. As I interpret those two words you used, I consider them the same. You refer to manner and method. I think that they are somewhat synonymous, so far as I am concerned.

The Court: Let me hear the question.

(Question read.) [122]

The Court: All right, he has answered the ques-

(Testimony of Jay Bruch.)

tion that he thinks both "manner" and "method" are synonymous.

Q. (By Mr. Collett): You did not examine the accuracy of the figures that were given upon which the computation was based?

A. No, I did not.

Q. You did not. Mr. Bruch, you stated that as a result of the inventory that was taken by the government on May 2nd, and the relating that to April 1st, resulted in the apparent over-declaration by the taxpayer, plaintiff in this case, of 108.97 proof gallons; and that the taxpayer thereafter explained to you that there were sixty cases stored at 499 Haight Street. Where did that conversation occur?

A. Where?

Q. Yes. A. In the office of Mr. Marosis.

Q. When?

A. Oh, it would be sometime about the middle part of 1948, prior to the preparation of our claim for refund.

Q. How did he happen to tell you about the sixty cases? How did that matter arise?

A. It arose because I asked him why there would be a difference of 108.97 proof gallons for the short period between April 1st, 1944, and May 25th, 1944.

Q. Did he say anything further about these sixty cases?

A. No, other than the sixty cases was the amount that remained of the [123] 100 cases which he had on hand at Haight Street on April 1st, 1944.

(Testimony of Jay Bruch.)

Q. He told you that on April 1st there were 100 cases at 499 Haight Street, and that on May 2nd, the day the government took inventory, that there were sixty cases remaining at 499 Haight Street, is that right? A. That is right.

Q. Did he say anything further with regard to those sixty cases?

A. No, he did not, to my recollection.

Q. And you were satisfied the difference between the 108.97 and 103.4 was immaterial, is that right?

A. That is right.

Q. Did he state why they were at 499 Haight Street?

A. No, I don't remember that he did state why they were at that location.

Q. Do you know what happened to those cases after May 2nd?

A. No, I do not know what happened to the cases.

Q. Did he say anything to you about why they were not included in the government's inventory?

A. Yes, he said they were not included because they were not at the Geary Street store where the inventory had been taken.

Mr. Collett: No further questions.

Mr. Grupp: You may step down. Oh, pardon me a minute.

(Testimony of Jay Bruch.)

Redirect Examination

By Mr. Grupp:

Q. Mr. Bruch, you were asked relative to plaintiff's exhibit 18-B. I am calling your attention to all of the plaintiff's exhibit 18, which consists of other books similar to plaintiff's exhibit 18-B, and ask you—loose-leaf books—and I will ask you whether you know what these records are?

A. After listening to the testimony I do.

Q. I will ask you whether these books are part of the permanent bookkeeping records of this establishment or any establishment like it?

A. I would not consider them to be.

Q. What are, in your opinion, the permanent records of an establishment such as operated by Mr. Maroosis?

A. The original books of entry and ledger are customarily considered the permanent books of an establishment.

Q. Handing you plaintiff's exhibit 14, is that one of the books which you would consider the permanent books? A. Yes, it is.

Q. Now, are there any other books in these various exhibits that you have seen offered here which are considered or deemed to be permanent bookkeeping records of an establishment such as Mr. Maroosis operated, any such as plaintiff's exhibit 17—if you want to just glance at these—or plaintiff's exhibit 19, or plaintiff's exhibit 18?

(Testimony of Jay Bruch.)

The Court: Just a minute. 18? [125]

Mr. Grupp: No, that is 15. I misread that.

Q. Plaintiff's exhibit 16. Are any of these deemed to be the permanent bookkeeping record of an establishment such as Mr. Maroosis operates?

A. No, they are not.

Q. In your experience as an accountant, Mr. Bruch, such records as are not permanent bookkeeping records, referring specifically to plaintiff's exhibit 18, are those books not permanent books of record generally kept five, six, seven, eight, nine years by an establishment?

A. No, they are not generally.

Q. Mr. Bruch, do the permanent records, bookkeeping records of Mr. Maroosis's bookkeeping system, contain all the information that, in turn, could be found in any of these other exhibits in the ultimate result?

Mr. Collett: Oh, I am going to object to that question as being involved, complex, irrelevant, immaterial.

The Court: Unless he first says he has carefully examined all these other exhibits——

Mr. Grupp: Might I ask that question?

Q. Have you examined all the other exhibits?

The Court: Name them.

Mr. Grupp: Yes. Let's ask in each instance, then.

Q. Have you examined plaintiff's exhibit 18?

A. Yes, I have. [126]

(Testimony of Jay Bruch.)

Q. Do you know what that plaintiff's exhibit 18 represents? Do you know what those various books comprising plaintiff's exhibit 18 are?

The Court: I am not going to require you to go through all the case again. I am only asking him—you are asking what you find in one exhibit he can find in another. I want to know if he knows what is in it.

Q. (By Mr. Grupp): Now, Mr. Bruch, I will ask you if you have examined plaintiff's exhibit 17?

A. I have.

Q. And have you examined plaintiff's exhibit 15? A. I have.

Q. And plaintiff's exhibit 16? A. I have.

Q. I will ask you if the information contained in the exhibits I have just questioned you about—I will repeat them again—the information in plaintiff's exhibits 17, 15, 16, 19 and 18, are contained in the permanent books of records of Mr. Maroosis' establishment, plaintiff's exhibit 14?

A. I cannot fully answer that question without making an audit to definitely determine whether all of that information is included in the book.

Mr. Grupp: All right. I see. I have no further questions.

Recross-Examination

By Mr. Collett:

Q. Mr. Bruch, can you go through that bunch and show the Court how the figure of \$5,912.24 was determined as of July 1st, 1943?

(Testimony of Jay Bruch.)

A. I can attempt to. As I testified previously, I did not check up the figure, but I can endeavor to do so. I cannot answer whether I can check it without having done it previously.

Q. Do it.

A. From this here record it isn't possible to check the distilled spirits inventory for the reason that the inventory figures shown on the books includes all merchandise, inclusive of distilled spirits. It would be necessary to actually figure the inventory, detailed inventory as of July 1st, 1943.

Q. Can you tell us how the State Board of Equalization got the figure of \$5,912.24?

A. It was taken undoubtedly from the detailed inventory as of July 1st, 1943.

Q. Well, the State Board of Equalization audit was for the period from July 1st, 1943, to May 25th, 1944, and was made after May 25th, 1944, wasn't it?

A. Yes, it was.

Q. Well, where is the inventory from which the figure \$5,912.24 was determined?

A. Could I have that question repeated?

The Court: Yes, you may read it.

(Question read.)

A. I do not know. [128]

Q. (By Mr. Collett): You never saw such inventory? A. I did not.

Q. Is there any record in the book that there was such an inventory taken?

(Testimony of Jay Bruch.)

A. There is an indication that an inventory was taken on that date according to the book record.

Q. What is that indication?

A. The indication is from the fact that as of June 30th the general entry was made affecting the merchandise inventory account, adjusting the inventory account to the inventory as of June 30th, or July 1st, 1943.

Q. What is the figure?

A. The adjustment as of June 30th was a credit to the account of \$1,201.19, which——

Q. Credit to which account?

A. To the merchandise inventory account.——which resulted in adjusting the merchandise inventory account as of June 30th to \$8,890.99 as being the total merchandise inventory at that date.

Q. There is no figure there that shows the difference between the \$5,912.24—how that was determined actually, is there?

A. There is nothing in this record as I can find it.

Q. Now, the daily sales sheet for the period from January 1st, 1944, to May 31st, 1944, shows a total of \$35,450.93?

The Court: Is that a statement by you or a question, or does it appear from any exhibit? [129]

Mr. Collett: The figure that was quoted to the Court this morning by Mr. Maroosis from the exhibit 18-B, that the Court read, \$35,450.93, was shown to be from the daily sales sheet from the

(Testimony of Jay Bruch.)

period January 1st, 1944, to March 31st, 1944. I call your attention, referring to plaintiff's exhibit 9 and the portion of said exhibit which determined the total additional fee of \$750 due to the State of California, it shows the quarter ending 3/31/44, that Mr. Maroosis reported distilled spirits sales of \$60,566.48.

The Court: That is for what period?

Mr. Collett: January 1st, 1944, to March 31st, 1944.

The Court: To whom did he report that?

Mr. Collett: To the State Board of Equalization. And that as the result of the audit by the State Board of Equalization they determined the figure to be \$90,722.53.

The Court: Is this of sales?

Mr. Collett: Distilled spirits sales audited.

The Court: 90,000——

Mr. Collett: \$90,722.53.

Q. Mr. Bruch, can you explain the differences between those three figures? A. Yes, I can.

Q. Will you explain them?

A. The figures reported by Mr. Maroosis were based on an estimate of his total gross sales as being distilled spirits [130] sales, whereas the figure as audited reported the actual determination by the State Board of Equalization of his actual distilled spirits sales during that period.

Q. And the third figure?

A. I believe, as I recall the question, you only mentioned two figures.

(Testimony of Jay Bruch.)

Mr. Collett: Can you go back Mr. Reporter——

The Court: Well, just a moment. He mentioned another figure of \$35,450.93 as the sales from January 1st, 1944, to March 31st, 1944, inclusive.

A. I didn't quite recall that. The difference between the last figure mentioned of \$31,000——

Q. (By Mr. Collett): \$35,450.93.

A. ——and the figure actually determined by the State Board of Equalization as being his distilled spirits sales is the difference between incomplete figures represented in the first instance.

Q. Which is the first instance?

A. The \$35,000 figure.

Q. Incomplete in what respect?

A. In respect that that is not representing the total sales for that period.

Q. How do you know?

A. Because his books definitely show that his sales for that period were, as I recall some \$86,000.

Q. Do his books show what sales were effected to accomplish the difference between \$35,450, and, you say, \$86,000?

A. Yes, as I recall, I think it is set forth in that exhibit. If I could refresh my recollection I should find the actual figure that appears for refund claim.

Q. Could you show from the books just what was sold to accomplish the difference between \$35,450.93 and \$86,000, as you say?

A. There is nothing in the books which would show the difference. The books show what the

(Testimony of Jay Bruch.)

actual sales were. It isn't customary if I could explain it, it isn't customary for the books to show the difference between——

Q. No, Mr. Bruch, the books show a figure, isn't that right, a figure of \$86,000 and some odd cents. Can you give us the exact figure? You have the book, I think, before you.

A. The books would show more than that figure. If I might, I would prefer to refer to the exhibit which you have, which shows the sales for the quarter. I would have to add up the various figures.

Q. This is the State of California audit, isn't it? Can't you take the book and show me the figure I am referring to?

A. I am referring to the figure as it affected the refund claim we had prepared. I am familiar with what is contained in that.

Q. Aren't you familiar with the books?

The Court: Just a minute. I am interested in this: can [132] you show where the sales, what the sales were for the month of January, 1944; what the sales were for the month of February, 1944; and what the sales were for the month of March, 1944?

A. Yes, I can from that book.

The Court: Tell me where you get it.

A. All right.

The Court: What exhibit are you looking at? What exhibit are you using?

A. The figures I would give are taken from exhibit 14.

(Testimony of Jay Bruch.)

The Court: Tell us the page.

A. It is under the section which has a table marked "Expense" and the sheet is unnumbered. It is the fourth from the last sheet of this section, the following section being designated "Compensation Record." The headings appearing on the sheet are as follows from left to right, if you want to identify it.

The Court: Well, that is enough. Give me the amount for those three months.

A. The amounts for those three months: January, 1944, \$43,494.30;—

The Court: That is sales?

A. Sales. Sales for the month of February, 1944, \$25,029.82; and March, 1944, \$23,243.28. I might mention that last figure was arrived at by adding two figures together.

The Court: All right. Well, if those three figures are added you do not get \$86,000.

A. I have added the figures from this ledger that add to the [133] total of \$91,767.40, but I can explain what the difference is, your Honor, if I may.

The Court: You may.

A. The difference between the \$91,767.40 and the figure which I mentioned I believe is entirely represented by sales tax which was excluded in the figure that I quoted. The figure appearing on this ledger which I called off and which appeared in exhibit 14 includes sales tax.

(Testimony of Jay Bruch.)

The Court: You may proceed.

Q. (By Mr. Collett): Again I will ask you if there is anything that you can discover in that book that will disclose what was sold to make up the difference between \$35,450.93 and the \$91,767.40 that you just gave the Court for the first three months of 1944, January, February and March?

A. I believe I answered the question before, but I will repeat it. I can tell nothing in the books which will disclose that difference.

Q. Nothing? And you do not yourself know what that difference consisted of, is that right?

A. I do not know. I have an opinion of what it does,—

Q. Now, do you know what the total sales for the month of December were?

A. What year?

Q. 1943, excuse me.

A. According to this, Mr. Maroosis' books, the sales for the [134] month of December—

The Court: This is again exhibit 14, is that right?

A. That is right.

The Court: Proceed.

A. His sales were \$62,946.84, as shown by exhibit 14.

Q. (By Mr. Collett): Now, is there anything in the books to show what was sold that resulted in the figure \$62,946.84 which you just gave?

A. No, there is nothing in the book.

(Testimony of Jay Bruch.)

Q. Now, Mr. Bruch——

A. In exhibit 14, to be specific.

Q. Well, from any of the books and records which you have here?

A. There would be for the details of the \$62,-946.84 to the extent that it would be broken down by daily sales which comprise that monthly total.

Q. Daily sales were the basis of determining what was the figure, is that what you mean?

A. That is right.

Q. If you have no record of what you sold daily, there is nothing to tell what was sold?

A. That is correct.

Q. I call your attention to plaintiff's exhibit 21, the second page thereof at the bottom. It shows "Gross Sales 1943," then it is broken into three columns. The figures given there for [135] the months of July, August, September, October, November and December for gross sales, are they reflected in the books? A. Yes, they are.

The Court: What month?

A. July, 1943, to and inclusive of the month of December, 1943.

Q. (By Mr. Collett): Can you give us from the books the similar figure for the period November, 1942, to June 30th, 1943?

The Court: This is from exhibit 14?

A. I do not know whether I am able to give any figures prior to the month of January, 1943, for the reason that this sheet which I am looking at, one

(Testimony of Jay Bruch.)

of the sheets I am looking at, only goes that far back. I will give the figure from that date forward, then in this to search to see if I can't find the total sheet, the prior period. The month of January, 1943——

The Court: These are gross sales?

A. Gross sales including sales tax, \$5,608.53; the month of February, 1943, \$6,990.19; the month of March, 1943, \$7,595.88; April, 1943, \$8,573.26. That last figure is a net of two amounts. May, 1943, \$8,141.70; June, 1943, \$9,643.77.

The Court: It is after four o'clock. How much more do you have to question this witness?

Mr. Collett: Not very much.

The Court: How much is "not very much"?

Mr. Collett: Well, I think I am just about through.

Q. Mr. Bruch, I think I have a little complication here—— [136]

Mr. Grupp: I think he has some other figures you asked for. I know they are in the book, but I think the witness is having some difficulty finding them.

Mr. Collett: That is right.

A. The other sheets are in a different section and I was looking for it, and I now have found it, and can furnish you those other figures. What was the starting date?

Q. (By Mr. Collett): November 1st, 1942.

A. Sales for the month of November, 1942, as

(Testimony of Jay Bruch.)

shown on a sheet marked "R-5" under this section "Sales" in exhibit 14, the November, 1942, sales were \$6,340.42; and the sales for the month of December, 1942, were \$6,990.04.

Q. I didn't get the November one.

A. \$6,340.42.

Q. Between your total of \$91,767.40 as opposed to the figure of \$86,000 which you said was less the sales tax, as total sales of the first three months of 1944, is the figure of \$90,722.53; would that include sales tax or was sales tax deducted from that?

A. I would have to look at the figures.

Q. I am showing you now again plaintiff's exhibit 9 for the retail distilled spirits sales audit report—column "Distilled spirits sales audited."

A. It appears that those figures included sales tax.

Q. Well, does the figure 96.41 relate to a figure which includes sales tax? [137]

A. Yes, it does.

Q. Is that a figure which was concerned only with distilled spirits?

A. You refer to two figures, namely a total sales and you now are asking about one figure, I am not clear——

Q. 97——

A. That is concerned with \$90,722.57, is concerned with distilled spirits.

Q. What would the total sales have been?

A. For what period?

(Testimony of Jay Bruch.)

Q. On that figure, what would the total gross sales have been on that figure?

A. For the same period?

Q. You have \$90,722.53 representing the sales of distilled spirits for the period which is indicated. What would the total gross sales have been for the same period? Do you have that figure?

A. Yes, as previously testified, the total sales for the same period were \$91,767.40.

The Court: Just a moment. I think that what was asked was if the state auditor's figure was \$90,700 on distilled spirits, what was the state auditor's total sales for that period, one hundred per cent. That was 96. per cent. Now, what was one hundred per cent.

A. The one hundred per cent, would be what I said, \$91,767.40. [138]

The Court: Of course, my mathematics—if \$90,700 was only 96 per cent—I would think it would be nearer 98 or 99 per cent.

A. It would be on the basis of those figures, your Honor.

Mr. Collett: It would actually be 94——

Mr. Grupp: I think the error occurred——

Mr. Collett: We might let the witness testify.

The Court: Let the witness testify.

A. I am unable to find any discrepancy in my previous statement, namely, that the total gross sales for the three month period ending March 31st, 1944, were \$91,767.40.

(Testimony of Jay Bruch.)

Q. (By Mr. Collett): Deducting sales tax?

A. That includes sales tax. And that for the quarter ending March 31st, according to the State Board of Equalization figure, their audited amount showed \$90,722.53 as distilled spirits sales, which would mean that the percentage of distilled spirits sales during that quarter were approximately 99 per cent.

Now, the explanation for the discrepancy between the approximate 99 per cent and 96.41 per cent is the fact that the 96.41 per cent covers the period from July 1st, 1943, to May 25th, 1944, the average for that period, whereas, we are comparing that average for that longer period with the percentage of distilled spirits sales for just one quarter, namely, the quarter ending March 31st, 1944.

Q. Doesn't the average apply equally all the way through on [139] the figure?

A. Oh, definitely not.

Q. You say \$90,722.53 includes sales tax?

A. I didn't catch that.

Q. You say \$90,722.53 includes sales tax?

A. It appears that it does.

Q. Where does it appear that it does?

The Court: Well, counsel, the late hour doesn't seem to be getting any shorter. I think we ought to adjourn until tomorrow, Saturday morning. Counsel, I might say this: without controlling or discounting what the attorneys may do, it has been my experience over the years that an individual—

(Testimony of Jay Bruch.)

if a party on one side wishes to establish something by cross-examination they may do it in a day when they can establish exactly the same thing by their own witness in fifteen minutes. Now, counsel can take that to heart. I am not directing or controlling cross-examination, but I sometimes have been in a position where counsel has spent days to get something confusedly when they actually had the witness who could put it in in fifteen minutes.

We will adjourn until tomorrow morning. What time? We have put in approximately a day this afternoon, that is, a judicial day of four hours. When could we meet tomorrow?

Mr. Grupp: At the Court's convenience. As far as I am concerned, I will have just one explanation to offer with reference to one of the exhibits, and I will be through. [140]

The Court: Exhibit 28?

Mr. Grupp: The exhibit that comprises the \$35,000 figure.

The witness: Your Honor, do you wish me to answer the question before we adjourn?

The Court: I don't wish any more answers. Now, counsel, I wish this case finished tomorrow. I have the idea that you can spend two weeks on this case. I have the opinion you can spend a portion of tomorrow more profitably than you can two weeks. If there are some salient, convincing points about these books, it will be far more impressive to the Court if those are put in speedily than if those

(Testimony of Jay Bruch.)

salient points are buried amongst a great mass of questions that somebody wants asked. I am not an accountant. Necessarily, over the years I have had to have a good deal of experience with the work of accountants, and as an attorney I necessarily had to have a system of picking out those things which I deemed important, hoping that they would be understood by the jury or the judge who was sitting. Now, endeavor to get the things that you want. Endeavor to eliminate the rest.

If you had me as a certified public accountant I might be able to digest a lot more than I can in my present capacity. Now, gentlemen, I want this case finished tomorrow. If the government is right, you can convince me without a great deal of time. If the plaintiff is right, you can convince me without a great deal of time. If it is going to take the government two [141] weeks to convince me about these books the government probably never is going to convince me. Similarly with the plaintiff. If we would meet at nine and run until 12, I think you can complete this. I can see on cross-examination you can spend all of tomorrow or all of next week, but if you have a few questions that are put, they ought to show the trend of what the next questions would produce. I wonder if we can't meet at 9 o'clock with the idea of quitting at 12?

Mr. Grupp: It is agreeable with us, your Honor.

The Court: This trial is adjourned until tomorrow morning at 9 o'clock. The Court expects to have the case submitted by 12 o'clock.

(Thereupon this cause was adjourned to Saturday, November 19, 1949, at the hour of 9 o'clock a.m.) [142]

November 19, 1949, at 9:00 o'clock

J. BRUCH

resumed the stand, previously sworn.

The Court: All right, gentlemen, the witness is on the stand. You may resume.

The Witness: Your Honor, shall I answer the last question?

The Court: The last question is unanswered. The last question is stricken. You may repeat whatever question you wish.

Mr. Collett: I have no further questions; I am through.

Redirect Examination

By Mr. Grupp:

Q. Mr. Bruch, in the cross-examination yesterday afternoon, you were given three figures; one was a figure of some \$30,000 odd dollars—three figures were \$35,000, one was \$60,000 odd, and one was \$90,000 odd. The \$35,000 figure was taken from plaintiff's exhibit 28, and in your answer you mentioned something about that being incomplete. Can you tell us why the figure of \$35,000 was an incomplete figure?

Mr. Collett: If the Court please, I am going to

(Testimony of Jay Bruch.)

object; calling for hearsay testimony. The witness testified only on information from those books and any information further than that is particularly hearsay, what someone else may have told [143] him.

Mr. Grupp: We are directing our questions to the books, your Honor, specifically.

The Court: That may be true, but you asked him about those, and they are entitled to an answer. Overruled.

A. I stated they were incomplete because I—in a previous observation there was a summary which did add up to much more than \$35,000 figure.

Q. (By Mr. Grupp): Looking at plaintiff's exhibit 28, is that summary as it was introduced a complete summary of the sales for the period covered? A. It is not a complete summary.

Q. Now, did you, prior to the introduction of that document in evidence, prior to the time cause any sheets to be removed therefrom?

A. Yes, I did.

Q. And when did you find and discover, find that sheet, Mr. Bruch?

A. After the testimony yesterday I did check our files and papers and found that we had the summary sheet. Because of the claim we had filed, we had it to support the amount that was in the claim.

Q. Will you give us that summary sheet that you have?

Mr. Grupp: Might we ask this be marked as

(Testimony of Jay Bruch.)

plaintiff's exhibit for identification next in order?

The Clerk: Plaintiff's exhibit No. 30 for identification.

Q. (By Mr. Grupp): Now, Mr. Bruch, on this sheet there is some writing in addition to some type-written notes? A. There is.

Q. You have examined that this morning, have you? A. I have.

Q. Whose writing appeared thereon?

A. Part of the writing is mine, and the other part of the writing is by Mr. Charles Robinson, who was employed by the firm of John F. Forbes & Co., and who worked on the papers for claim for refund.

The Court: Employed by whom?

The Witness: John F. Fobes & Co.

Q. (By Mr. Grupp): The name of the individual other than yourself is——?

A. Charles Robinson.

Q. And when was Charles Robinson employed by your firm?

A. He was employed by our firm for I think it is approximately one year prior. That is the answer, approximately one year.

Q. Do you know when that was?

A. It is about the year 1948, roughly the entire year 1948, roughly speaking.

Q. And do you know where Mr. Robinson is today?

A. He is now employed by the Internal Revenue Department.

(Testimony of Jay Bruch.)

Q. And is he in San Francisco?

A. To the best of my knowledge he is. [145]

Q. And prior to the time he worked for you, do you know by whom Mr. Robinson was employed?

A. Employed by the Internal Revenue Department.

Q. In other words, his employment with you was interim employment? A. It was.

Q. Employed first by the Internal Revenue and by you and then went back to the Internal Revenue?

A. That is correct.

Q. Where he still is, so far as you know?

A. That is right.

Q. I hand you exhibit No. 30 for identification. Can you just tell us which of the writing which appears on that was Mr. Robinson's writing?

A. The words "comparable figure" and the amount of "\$89,529.17" and then two ratios, the ratio of \$86,054.86 to \$87,822.90, which was equivalent to 97.9 per cent, and the ratio of \$86,054.86 to \$89,529.17, or 96.1 per cent.

Q. Now, the rest of that writing on there is your own, is that correct? A. That is correct.

Q. Now, Mr. Bruch, where did you get this sheet?

A. That sheet was taken by me from—may I refer to the number of that exhibit?

Q. Yes. [146]

A. From what has been introduced as exhibit No. 28.

(Testimony of Jay Bruch.)

Mr. Grupp: We offer in evidence, your Honor, plaintiff's exhibit 30 and identify it for the record as a part originally of plaintiff's exhibit No. 28.

Mr. Collett: I am going to object at this time, if the Court please; the foundation completely hasn't been laid yet and why it was taken out of the record, why it wasn't a part of the record when it was introduced here as a complete record, coming in now with another sheet of paper. The Court already advises it wants to terminate this case at 12:00 o'clock.

The Court: Let me see it.

Mr. Collett: Papers taken out of the exhibits purportedly to be complete and the witness testifying it is complete and then we find additional papers coming in, we could go on this case forever.

The Court: I will reserve ruling on it. I doubt that I will admit it.

Mr. Grupp: In view of the Court's statement, might I lay further foundation?

The Court: You can try.

Q. (By Mr. Grupp): Mr. Bruch, at the time the plaintiff's exhibit 30 for identification was first seen by you, where was it?

A. It was included in the folder that has been submitted as exhibit 28.

Q. And was it clipped in with the rest of the typewritten pages? [147] A. It was.

Q. And what was the purpose—did you yourself remove the document from what is now plaintiff's exhibit 28? A. I did.

(Testimony of Jay Bruch.)

Q. And what was the purpose of your removing it?

A. I removed it for the reason that the figures in our claim for refund used some of the figures which were on that summary sheet, and as a matter of fact, Mr. Robinson's computation of the ratios which I read off, are actually the figures which are quoted in the claim for refund which he assisted in preparing for our firm.

Q. And you retained that document in your files until you presented it in court this morning?

A. Yes, that is right, from the time I removed it.

Q. Now, Mr. Bruch, I hand you plaintiff's exhibit No. 17——

The Court: Is this re-direct?

Mr. Grupp: Yes, your Honor.

The Court: Expecting to go back to direct on this witness?

Mr. Grupp: This is still with reference to this document, your Honor.

The Court: All right.

Q. (By Mr. Grupp): I will ask you if, upon your previous examination plaintiff's exhibit 17 contains the basic information which is contained in plaintiff's exhibits 28 and 30. [148]

A. I wouldn't call it "contains basic information," the answer would be no.

Q. Just what is 17, now? A. 17 is——

The Court: We have gone through that. I want to be very careful you are not opening up on direct

(Testimony of Jay Bruch.)

on this witness. This is re-redirect, as I remember it. In other words, it is direct, cross-examination, redirect, recross, and now back on re-redirect.

Mr. Grupp: I don't think I have had any re-direct, your Honor, on this witness.

The Court: Well, we will look. Oh, yes. Had direct, cross, redirect, recross, and now back on re-redirect. There must be orderly presentation of evidence.

Mr. Grupp: Frankly, your Honor, I don't dispute your Honor's notes——

The Court: That was my recollection and my notes verify it. I can tell you the questions asked on cross-examination and redirect and then recross.

Mr. Grupp: Mr. Bruch, just one or two other questions, then.

Q. Can an audit of Mr. Maroosis' books be conducted without reference to plaintiff's exhibit No. 18, plaintiff's exhibit No. 17, plaintiff's exhibit No. 19——

The Court: Be conducted without reference to 18, 17, 19, is that right? [149]

The Witness: Yes, sir.

Q. And 15.

Mr. Collett: I object, if the Court please; that is incompetent, irrelevant and immaterial.

The Court: Well, I will let him answer the question.

Q. (By Mr. Grupp): Do you want to examine any of these records?

A. May I examine that exhibit there?

(Testimony of Jay Bruch.)

Q. You are referring to the ledger?

A. Yes. An audit could be examined without the exhibits which you have mentioned, except exhibit No. 17. In my opinion, it would be necessary to have exhibit 17 in order to make an audit of the books.

Q. And exhibit No. 17—well, we have that already.

In posting the sales to the ledger, from what records are those sales posted?

The Court: Is this re-redirect?

Mr. Grupp: Your Honor, as I understood the examination of the witness on cross, the——

The Court: I am not talking cross, you have had redirect.

Mr. Grupp: Frankly, I can't distinguish in my mind what was asked on cross and if there was a recross, I frankly admit that to the Court.

The Court: We will never be through with this case.

Mr. Grupp: I have one other question. [150]

The Court: One question?

Mr. Grupp: This question I just asked and one other question.

The Court: Read the question.

(Question read by the reporter.)

Mr. Grupp: I should have changed the last word "posted" to "determined."

Q. From what—pardon me, in posting monthly sales to the ledger, from what records are the sales determined?

(Testimony of Jay Bruch.)

A. They are determined from the information appearing in exhibit No. 17.

Mr. Grupp: I am going to waive the other question.

The Court: All right.

Recross-Examination

By Mr. Collett:

Q. Mr. Bruch, that assumes the accuracy of the daily sales?

A. No, it does not, because the accuracy—the entries would be made——

Q. That is exhibit No. 17?

A. Exhibit No. 17.

Q That is based on the daily sales, isn't it, and it doesn't show what the daily sales are? You assume the accuracy of the daily sales when you take the recapitulation, isn't that right?

A You say when I take the recapitulation?

Q. You stated that the daily sales come from exhibit 17, that is a [151] recapitulation, isn't it, of the daily sales, the actual sales that were made?

The Court: No, counsel, your question answers itself. I am going to hold—if it is assumed that exhibit 17 is correct, and is shown it isn't correct, then, what is?

Mr. Collett: No further questions, if the Court please.

The Court: All right.

Mr. Grupp: Step down.

Plaintiff rests, your Honor.

The Court: All right. Now, the plaintiff is subject to cross-examination. Mr. Maroosis.

The Clerk: You have been sworn. Please take the stand.

NICK W. MAROOSIS

resumed the stand, previously sworn.

Cross-Examination

By Mr. Collett:

Q. Mr. Maroosis, your exhibit No. 1, which shows the sale of the establishment—a certificate of an individual doing business under a fictitious name, you advertised as of March 13, is that right, that you were doing business under a fictitious name as an individual? A. I believe so.

Q. But actually as of that time the partnership was not terminated?

A. I don't remember. It was about that time.

Q. Didn't you state you took over the business on April 1? A. Yes, sir.

Q. Then it wasn't terminated on March 13?

A. I believe it was in the process of being terminated.

Q. But you advertised that you were doing business as an individual on that day?

A. I think an agreement had been reached and it was just a matter of the formalities, or the legal papers were holding up the——

(Testimony of Nick W. Maroosis.)

Q. What kind of a partnership was this between you and Mr. Kosloff?

A. A normal partnership.

Q. Equal share in the profits? A. Yes.

Q. And in the losses? A. Yes, sir.

Q. And how was the business managed and the business conducted?

A. How was it managed?

Q. Managed, yes.

A. Managed it to the best of my ability.

Q. What did you do?

A. I didn't do anything.

Q. You didn't do anything? A. No, sir.

Q. What do you mean, you didn't do anything at all with regard [153] to the business?

A. Well, the arrangement that was had was that Mr. Kosloff was to draw, as I recall originally, \$50 per week, if my memory serves me correctly, and that was his share for the working end of the business, and later on it became \$75 a week, and later on it became \$100 a week, \$100 a week that he was drawing over and above what I was drawing. In other words, he was drawing \$100 a week, because I wasn't a working partner, he was the working partner. And I believe it was on or about April 1st that I started drawing a salary, as I recall. I am not sure, I wouldn't want to be quoted. I mean I am just speaking from my memory.

Q. When did you enter into this partnership?

(Testimony of Nick W. Maroosis.)

A. I believe in '41, I think October; possibly shortly before that.

Q. And the partnership concerned which of the stores? A. Just the 458 Geary Street.

Q. Just 458 Geary Street? A. Yes, sir.

Q. Were you at 458 Geary Street selling merchandise?

A. I was there quite a bit after April 1st.

Q. Prior to April 1? A. Very seldom.

Q. What bank accounts did you have for the 458 Geary Street store prior to April 1, 1944? [154]

A. At the Jones-Geary branch of the Bank of America.

Q. Any other? A. No, sir.

Q. And in whose name was that account?

A. Mr. Kosloff's and myself.

Q. And who signed the checks?

A. Either Mr. Kosloff and myself.

Q. Did you sign any?

A. I imagine I did.

Q. Don't you know whether you did or not?

A. Well, I should think I would, naturally.

Q. Did you or did you not sign checks during this period?

A. If you give me a specific check I will be able to answer yes or no. You will probably find that I did. I was full-fledged to sign and I probably signed most of them.

Q. Now, Mr. Maroosis, we have had three figures

(Testimony of Nick W. Maroosis.)

that have been presented to the Court concerning daily sales for the period January 1 to March 31, 1944. A. Yes, sir.

Q. The first figure, \$35,450.93; the second—that is taken from the daily sales record—the second, \$60,566.48, which is reflected in your return to the State Board of Equalization; the third figure, \$90,727.53, which figure was determined by the State Audit to be the quantity of, or value of the distilled spirits sold by you during the period from January 1, 1944, to [155] March 31, 1944. Will you explain to the court the differences in those particular figures as a matter of the actual sales of the distilled spirits? A. What difference?

The Court: Just a moment, that is enough. You may answer the question.

A. Well, the first figure I believe is the figure that was not complete as of the sales. It was an incomplete figure of the sales between April—between January 1 and April, or March 31, 1944. When I was up on the stand here before I was told to answer it yes or no and I answered it yes or no and read the figures contained therein, which were incomplete. Is that it? Shall I go further, your Honor?

The Court: Whenever you think you have answered the question.

The Witness: Yes, I answered the question. This 35—now, with regard to your second figure of 60, we were in error in our report to the State Board.

(Testimony of Nick W. Maroosis.)

The audit the State Board made confirmed the fact, or I should say, we later checked it to be true, that the distilled spirits that should have been reported should have been 96. something, 41, I believe, or 49, something of that nature, and that was the figure that we ultimately paid on because we found the figure to be true and correct through our own audit, through our own check of the State Board's audit.

Q. The accountant indicated the \$86,000, according to your books, is the figure which shows your sales during that period. Will you please explain and answer my first question: What is the difference between \$35,450.93——

Mr. Grupp: Just a minute, I am going to object on the ground that has been answered.

The Court: He says it was incomplete.

Q. (By Mr. Collett): Wherein was it incomplete?

A. Well, inasmuch as the entire book was not there, the entire sheets, the balance of the sheet was introduced this morning.

Q. What do you mean, the balance of the sheet was introduced this morning?

A. The sheet that was introduced this morning makes up the difference of the figures, does it not?

Q. By that you mean this figure of \$52,331.97, which appears on plaintiff's exhibit 30 is whiskey?

A. I believe so.

Q. Where did that figure come from?

A. That is Three Rivers whiskey. It is case goods.

(Testimony of Nick W. Maroosis.)

Q. What Three Rivers whiskey?

A. The Three Rivers whiskey we had on hand.

Q. When?

A. In that particular period.

Q. Where was this Three Rivers whiskey?

A. Where was it? [157]

Q. Yes. A. It was in the store.

Q. When?

A. Starting from February 25, or starting from February, I believe, I wouldn't want to be quoted on that day, starting somewhere in February, some day after February 14, and was inclusive until March 31, 1944, at 458 Geary Street.

Q. Was the whiskey in the store on March 31, 1944?

A. No, sir. It was—it had been previously in the store, had been sold. That is the sales you are looking at, sir.

Q. Well, where is there any record of the sale of this whiskey? A. In exhibit No. 17.

Q. Would you show it to me?

A. Surely, which specific day?

Q. You have given me a figure of \$52,331.97, which you say represents the sale of Three Rivers whiskey.

A. You have to understand this: that if—this is only elementary accounting—if we buy 775 cases of a whiskey and that if we buy that whiskey on February 15 and that on the 31st of March of the same year of 1944 that we have only 275 cases left, you can only assume that 500 cases was sold.

(Testimony of Nick W. Maroosis.)

Q. And that you consider to be elementary accounting, is that it? A. Yes, sir.

Mr. Collett: Mark this for identification.

The Court: Are you objecting to Exhibit 30? I have not [158] ruled on it yet.

Mr. Collett: I am not making an objection; trying to show what whiskey, to find out about that figure of \$52,000.

The Clerk: This will be defendant's exhibit A for identification.

Mr. Grupp: May I see that, counsel?

Mr. Collett: I might state the witness was here from the San Francisco Warehouse, if the Court please, and this document was shown to counsel for the plaintiff, and as I understand it, it was stipulated it was a correct records of the Three Rivers whiskey in the warehouse on the date the record shows. There is no objection?

Mr. Grupp: We have no objection.

The Court: Exhibit A is admitted without objection.

Mr. Grupp: So far as we are concerned.

(Whereupon warehouse record, previously for identification, was received in evidence and marked defendants' exhibit A.)

Q. (By Mr. Collett): Mr. Maroosis, calling your attention to defendant's exhibit A, that shows that 775 cases of Three Rivers whiskey was in the San Francisco Warehouse as of February 25, 1944, which represents 775 cases. Now, on March 2, 1900

(Testimony of Nick W. Maroosis.)

cases were delivered to 458 Geary Street. Can you show in the records the disposition of the 100 cases that were withdrawn on March 2?

A. I don't see why not. I mean, I can't specifically show [159] where an individual bottle was sold. I know a grocery store couldn't tell where they sold so many cans of condensed milk.

Mr. Collett: If the Court please, I asked——

The Court: You asked whether you can show that in the records.

A. We can show sufficient sales to offset the sale of the merchandise the gentleman is speaking of.

Q. (By Mr. Collett): Well, will you show from the exhibits that are here—these are your records—just wherein 100 cases of Three Rivers whiskey was disposed of.

A. On the 26th, the day following—what date was that you said: Will you give me that date again, please?

Q. March 2.

Mr. Grupp: Might the record show the witness is reading from plaintiff's exhibit No. 17.

A. On March 2, is that what you said?

Q. (By Mr. Collett): March 2.

A. On March 4 there was \$2,511.61 in sales. On the 6th there was \$2,332. in sales, and I should imagine that was principally Three Rivers.

Q. You don't know?

A. It would have to be. We have nothing else in the store in the line of whiskies to speak of. Certainly would be confirmed by the sales there.

(Testimony of Nick W. Maroosis.)

Q. Is your daily sales record for the—plaintiff's exhibit No. [160] 18B—can you find it in there?

A. On March 4, according to the sheets you have just given me, the exhibit No. 18, the sales for that particular day for all merchandise other than Three Rivers, was \$114.82.

The Court: Other than Three Rivers was how much?

A. Was \$190.81—I am sorry, I made a mistake on that figure—\$190.81. If you will total them you will find them to be correct, the daily sales for that particular day was \$2,511.61.

The Court: \$2,511.61?

The Witness: \$2,511.61, so the sales of Three Rivers for that particular day were the subtraction of \$190.81, the subtraction from \$2,511.61, which would be approximately \$2300.

Q. (By Mr. Collett): Your claim is that you sold 100 cases of Three Rivers on March 4 for \$2300?

A. Claiming that there were sales in that amount of approximately \$2300.

Q. You mean sales that are not recorded in this book?

A. Yes, sir; yes, sales, case merchandise.

Q. Well——

A. You see, I was not in the store. Mr. Kosloff was still in charge of the store. I never took over until April 1, 1944, at which time the inventory was taken, then I was in absolute control of the store.

(Testimony of Nick W. Maroosis.)

Mr. Collett: I ask that the witness' answer be stricken out as not responsive to that question.

The Court: Denied.

Q. (By Mr. Collett): Mr. Maroosis, how many cases of Three Rivers were sold on March 4?

A. I just had it here; I just showed it to you.

Q. Show me where it says anything about Three Rivers.

A. That is all the merchandise that was in the store, had to be Three Rivers, everything listed in the book, the balance would have to be Three Rivers whiskey.

Q. That was all the merchandise you had in the store?

A. To the best of my knowledge, everything was sold was written in that book, excepting the case sales.

Q. With the exception of the case sales?

A. Yes, sir.

Q. Now, on March 6 another 100 cases were withdrawn from the San Francisco warehouse?

A. Yes, sir. On March 6, there was—March 6 the sales for March 6 in distilled spirits was—in distilled merchandise in that book was \$164.49, and sales for March 6 were \$2,332.29.

The Court: \$2,332.29?

The Witness: \$2,332.29, so the subtraction of \$164.49 from the figure of \$2,332.29 would be the approximate sales of Three Rivers.

Q. Now, between the dates of the 3rd or the 4th

(Testimony of Nick W. Maroosis.)

and 6th, as you stated, as of the 6th, how many cases of Three Rivers did [162] you have left?

A. I don't know.

Q. You don't know? A. No.

Q. 200 cases have been withdrawn, but you don't know how many cases you have left out of the 200?

Mr. Grupp: As of March 6, was that question?

Mr. Collett: Yes.

A. There was no inventory taken on March 6.

Q. On these sales that don't appear in your books, how did you get those in the cash register?

Mr. Grupp: Just a minute, I am going to object to the question. It is assuming something not in evidence, unless you specify which book you are referring to.

The Court: Overruled.

A. Yes.

The Court: You may read the question.

(Question read by the reporter.)

A. Well, there was an auxiliary sales sheet. I will have to explain that. May I explain that?

The Court: Yes.

The Witness: The cash register at 458 Geary Street was a small cash register unlike the cash registers at the other stores. You could only ring sales, as I recall, to the amount of—I don't remember the amount—it was a smaller register, [163] nevertheless. I believe the amount went to 999, if I remember correct, \$999.99. Nevertheless, where there was sales in large quantities of money, that

(Testimony of Nick W. Maroosis.)

was put on an auxiliary sheet and then at the end of the day the particular whiskey was deducted from the, or added, I should say, to the cash register reading and subsequently banked.

Q. That was added by a pencil or an ink amount at the bottom of the paper, is that it?

A. If the tape checked, yes. If you will notice on that exhibit No., what is that exhibit?

Q. This one? 18B.

A. If you will notice at the end of each day you will notice on the left hand, the right hand side you will notice a check mark at the end of each particular day. You will notice the notes that was on the tape check and that in turn was added to the cash of the day and it was banked subsequently.

Q. How could we determine the actual sale price of one case of Three Rivers?

A. Well, I imagine the sale price would be in there, wouldn't it, except in cases where large lots may have been sold for a few dollars cheaper.

Q. Or for a few dollars more?

A. It is hardly possible. Selling in larger quantities, you usually sell cheaper, not more.

Q. There is no way you can tell what you actually sold a case [164] of Three Rivers for, it isn't entered in plaintiff's exhibit 18B.

A. Well, that would be the ceiling. If anything, it would be sold below that figure. Three Rivers was an inferior whiskey.

Mr. Collett: I ask that that answer be stricken.

(Testimony of Nick W. Maroosis.)

The Court: It will be stricken. Read the question.

(Question read by the reporter.)

A. Yes, sir.

Q. (By Mr. Collett): Other than is entered in this daily perpetual inventory, exhibit 18B, is there any way by which you can show us what you sold a case of Three Rivers whiskey for during this period of March 2 or March 6, which period we are concerned about, or any period during the month of March, at any time during the month?

A. It is elementary that if it would be sold in larger quantities it would be sold for a few dollars less, sold in quantity——

The Court: That doesn't help. You were asked, is there any way you can tell what it was sold for.

The Witness: Yes, it would have been sold cheaper than that, at that price or cheaper.

The Court: All right, you may proceed.

Q. (By Mr. Collett): Now, Mr. Maroosis, on defendant's exhibit A shows that on March 10, 100 cases were delivered from the San Francisco Warehouse——

The Court: What exhibit is this?

Mr. Collett: Defendant's exhibit A. Would the Court like [165] to look at this exhibit? It has been admitted in evidence.

The Court: All right, I just wanted to have the reference to the exhibit. Shows 100 cases delivered——

(Testimony of Nick W. Maroosis.)

Mr. Collett: March 10.

A. That would be answered in the same manner.

Q. Your answer would be the same for that 100 cases? A. Yes, sir.

Q. You don't know then, as of March 10, how many cases you have left out of the previous 200 that were withdrawn—know how many were left out of the 100 that were drawn out March 10, is that so?

A. I want to say this: I don't know physically. However, it is only natural that we wouldn't be drawing unless we needed it, because only selling the first 100 cases and drawing 100 cases, selling 100 cases and drawing 100 cases. If we sold it, we withdrew it.

Mr. Collett: I move that answer be stricken.

The Court: I will let it stand for what it is.

Q. (By Mr. Collett): Now, on March 30, 1944, it shows 200 cases delivered? A. Yes, sir.

Q. How do you account for the 200 cases?

A. I account for it in the same manner.

Q. Show us where you account for it in the same manner.

A. Well, on March 30 the sales is—I believe you have the [166] papers there, counsel.

On March 30, the sales other than Three Rivers was \$192.04.

The Court: \$192.04?

The Witness: \$192.04.

The Court: All right.

(Testimony of Nick W. Maroosis.)

A. (Continuing) The sales, the total sales for that period, day, were \$2,433.06. Should I do the 31st too while I am here?

The Court: You may.

A. (Continuing) The sales for the 31st were \$223 and the total sales for the 31st were \$2,663.90.

Q. Do you know how many cases of Three Rivers whiskey are accounted for in plaintiff's exhibit 18B in the daily sales or perpetual inventory?

A. Yes, sir.

Q. How many?

A. In dollars I can give you—I can't give it to you in—I have never totaled the cases. I can give you it in dollars.

Q. March 31 shows, I see it is listed here, there are two cases of Three Rivers? A. Yes, sir.

Q. There is a figure circled that says 80?

A. Yes, sir.

Q. What does that mean, sold for \$40 a case?

A. Including the sales tax. [167]

Q. Including the sales tax? A. Yes.

Q. On March 31 at the bottom, there is no number on this page, it is the second page from the fourth page from the end. March 31 shows again two figures circled, 80 and cases of Three Rivers; is that likewise two cases? A. Yes.

Q. At \$40? A. Yes.

Q. Now, what would be the total sale price of 200 cases of Three Rivers?

A. Well it depends on how it is sold. If it is

(Testimony of Nick W. Maroosis.)

sold in individual cases it should be the case times \$40, including the sales tax, or sold in larger quantities it could be down to \$33 a case.

Q. Yes. Now, what we were discussing, we reached the point where 200 cases had been withdrawn as of March 30. For the month of March so far 500 cases have been withdrawn.

A. Yes.

Q. On March 30, the morning of March 31, before you opened business, how many cases of Three Rivers whiskey did you have left of the 500 cases that had been withdrawn?

A. Be no way of telling.

Q. No way of telling? A. No, sir. [168]

Q. You don't know? A. No, sir.

Q. Now, on March 31 you withdrew 200 cases?

A. Yes, sir.

Q. What happened to those, the 200 cases of March 21?

A. I, think they remained in our inventory didn't they? I believe we had 275 cases left on April 1 when we declared our inventory.

Q. You testified on direct examination that at the 458 Geary Street, two thousand and fifty-six bottles was the way it was broken down?

A. Yes.

Q. Two thousand and fifty-six bottles accounted for in the inventory? A. Yes, sir.

Q. Which represented 171 and $\frac{1}{3}$ cases?

A. Approximately.

(Testimony of Nick W. Maroosis.)

Q. And you saw the 100 cases at 499 Haight Street? A. Yes, sir.

Q. When did you put the 100 cases there at 499 Haight Street?

A. I don't remember; I imagine it was on the 30th or 31st.

Q. Why were they put at 499 Haight?

A. We had very little room at 458 Geary and no business, no place to put merchandise.

Q. Where were they put at 499 Haight Street?

A. In the basement through a slide.

Q. What sort of an arrangement is that at 499 Haight Street? A. One of our liquor stores.

Q. To get into the basement how do you accomplish it?

A. Well, at that time the arrangement was this: but prior, or I should say, subsequently, we had——

Q. At the time—— A. A trap door.

Q. The cases were put into the basement?

A. Put in through a slide. I already answered that.

Q. What sort of a slide?

A. Just an ordinary slide, slide it down and——

Q. What size is the opening that gets into the basement? A. Prior?

Q. On the date that the cases were put in there, what was the size of the opening?

A. Should imagine probably six feet by four feet, or five feet, six feet by five.

(Testimony of Nick W. Maroosis.)

Q. Was any other liquor or other goods stored in that basement at the time?

A. None that belonged to 458 Geary Street.

Q. Was there any there belonged to 499 Haight?

A. More than possible there was some wine there.

Q. Do you know? A. I don't know, no.

Q. You don't know? A. No, sir.

Q. You don't know whether there was anything down there or not? A. No, sir.

Q. Do you know what the date was that that whiskey was put in that basement you testified to?

A. It would have to be—it would have to be either two or three days. As a matter of fact, before you saw that record, which you haven't allowed me to see, I thought it was, I recall on the 29th—as a matter of fact, I still believe it was taken out the 29th, and the record not made until the 30th. I called the San Francisco Warehouse and asked for the same records and they said they had been destroyed years ago. I don't know how to get it, it doesn't mean anything, but tell you what—how my memory serves me. I believe it was taken out on the 29th and well, this record wasn't made until the 30th.

Q. When were the 200 cases taken out that were shown on the 31st?

A. I imagine taken out on the 30th or 31st. I mean, whichever the warehouse preferred. We were in the habit of taking them out during the morning and some time during the afternoon, depends on when they were taken out.

(Testimony of Nick W. Maroosis.)

Q. You don't think that 200 cases shown as having been withdrawn on the 31st of March were actually withdrawn the 31st, or was withdrawn the 30th?

A. It says the 31st, and I am inclined to believe the record.

Q. Then you believe the record as to the previous entry? A. Yes, sir.

Q. Which of this group of 100 cases was stored in that? A. I don't remember, sir.

Q. You don't remember? A. No, sir.

Q. Did you tell Mr. Hedrick on May 2 that there were 100 cases at 499 Haight Street that belonged to 458 Geary? A. No, sir.

Q. Why not?

A. Oh, I would rather not answer it.

Mr. Grupp: I think you should answer any question put to you.

A. I asked—very well, if I am, I will. I asked Mr. Hedrick when he came in, offered my inventory and asked him if we could take this check, check my inventory, be faster, save a lot of time. Mr. Hedric says no. Things got very belligerent, said the only possibility, the only thing that was impossible was he or I could make a nigger baby. We were both very belligerent, I was fighting mad and so was he.

Mr. Grupp: I submit that should be stricken.

The Court: It will stand.

Q. (By Mr. Collett): You did not, however, tell Mr. Hedrick—

(Testimony of Nick W. Maroosis.)

A. I just told you we were not speaking from that point forward. [172] He took his own inventory and he told me it was subsequently 108 gallons overstated, and at that time I explained to him there were 60 cases at that time at the Haight Street store. We had cooled off by then.

Q. Were there any other cases of any kind of whiskey that you didn't report to Mr. Hedrick that you might have somewhere else? A. No, sir.

Q. Don't you think it was necessary to compute an inventory as of May 2 and endeavor to relay it back to April 1? Do you know what whiskey you had at the other places that might have belonged to 458?

A. It would have been obvious that the inventory would have to come in as overstated. Mr. Hedrick's computation could only prove one thing, that the inventory would have been overstated had I told him or had not told him, it wouldn't make a bit of difference, because our inventory was taken correctly April 1, 1944.

Q. Now, we have had the figures for the total sales for the period through 1943 and in the month of December it shows that there were sales in the amount of \$62,946.84.

The Court: How much is that?

Mr. Collett: \$62,946.84.

The Court: What month?

Mr. Collett: December of 1943.

The Court: December, 1943, sales were \$62,946.84. That [173] is from exhibit——

Mr. Collett: From plaintiff's exhibit 21. Like-

(Testimony of Nick W. Maroosis.)

wise it shows that for July it was \$10,672; August, \$10,909; September, \$13,892; October, \$15,003; November, \$13,160; December, \$62,946.84. Mr. Bruck disclosed to us from the books yesterday that from November 1, 1942, to June 30, it began at \$6,340, and maintained a slight increase from month to month up to \$9,643.77 as of June 30, 1943.

Q. How do you account for the disproportionate amount of sales in December, 1943?

A. Sales of whiskey.

Q. Sales of whiskey? A. Yes, sir.

Q. And you have no records to show what those sales consisted of? A. No, sir.

Q. Or what the sale price of any particular case of whiskey might have been? A. No, sir.

Mr. Collett: That is all.

Redirect Examination

By Mr. Grupp:

Q. Just one question, Mr. Maroosis.

Might I have this exhibit marked for identification, consists of two pages.

The Court: Exhibit 30 will be admitted. Such objection as there is is overruled. [174]

The Clerk: Exhibit 31 admitted in evidence.

Mr. Collett: No.

The Clerk: Did you say in evidence?

The Court: I am not saying anything about 31. Exhibit 30 I took under reservation, reserved ruling. Exhibit 30 is admitted.

(Testimony of Nick W. Maroosis.)

The Clerk: Plaintiff's exhibit admitted in evidence.

(Whereupon the document previously marked for identification was received in evidence as plaintiff's exhibit No. 30.)

The Court: Plaintiff's exhibit 31 for identification.

Q. (By Mr. Grupp): Mr. Maroosis, handing you plaintiff's exhibit 31 for identification, consisting of two sheets, and referring to the first sheet, which is a typewritten receipt from—whose signature appears on that document?

A. Mr. Hedrick's.

Q. And whose writing appears thereon?

A. Mr. Hedricks'.

Q. Now, at the time that that document was signed by Mr. Hedrick, was that signed on the date it bears, May 4, 1944? A. Yes, sir.

Q. Now, this sheet which is attached to this receipt, was that sheet referred to in the receipt?

A. Yes, sir.

Q. And did Mr. Hedrick receive the inventory and the list of serial numbers of Three Rivers on hand at that time? [175] A. Yes, sir.

Q. Now, at the time that this receipt was signed, plaintiff's exhibit 31, there was on hand in the Geary Street store how many cases of Three Rivers whiskey—let me strike that.

How many cases of Three Rivers whiskey were still in the Haight Street store as of May 4?

A. 60 cases.

(Testimony of Nick W. Maroosis.)

Q. And originally your inventory of April 1, 1944, disclosed how many cases at the Geary Street store? A. On which day?

Q. On April 1, 1944.

A. 3,256 bottles, I believe, which is about 271 cases.

Q. I am referring to how many in the physical inventory of the Geary Street store taken April 1, how many cases of Three Rivers were at the Geary Street store? A. About 171.

Q. The other 100 were at the Haight Street store? A. Haight Street.

Q. Now, you handed Mr. Hedrick on May 4, 1944, a copy of your written inventory as acknowledged by this receipt, of the Geary Street store, is that correct? A. Yes, sir.

Q. Which showed there were 176 cases at the Geary Street store? A. Yes, sir.

Q. At the same time you handed him a list of 231 serial numbers [176] of cases of Three Rivers on hand at Geary Street as of April 1, 1944?

A. Yes, sir.

Q. And handing him the receipt on the inventory and this list of 231 serial numbers, you got that receipt from him? A. Yes.

Q. Which is plaintiff's exhibit 31.

We will offer plaintiff's exhibit 31 in evidence.

The Court: Exhibit 31 admitted.

(Thereupon the document previously marked for identification was received in evidence as plaintiff's exhibit No. 31.)

(Testimony of Nick W. Maroosis.)

The Court: Let me see it.

Q. (By Mr. Grupp): Incidentally, Mr. Maroosis, I think counsel will admit this, but the law requires serial numbers to be destroyed on cases when they are opened? A. Yes.

Q. So that you could only give Mr. Hedrick the cases, the case numbers, serial number of cases which were still intact and unopened?

A. Yes, sir.

Q. So that this accounted for 231 of the 276 cases, would indicate what to you, Mr. Maroosis?

A. It would indicate that the balance of the cases were either on the shelves, in the warehouse, or were on display, or were made available for sale.

Q. In unbroken cases?

A. They were out of the cases.

Mr. Grupp: I have no further questions.

Recross-Examination

By Mr. Collett:

Q. I have no questions about that, if the Court please. I have maybe two more questions with regard to that 100 cases at 499 Haight, just take a moment.

Mr. Maroosis, who transported the 100 cases to 499 Haight Street?

A. I don't remember.

Q. You don't remember?

A. It was—must have been one of my employees, possibly could have been any one of my employees.

Mr. Collett: That is all.

Mr. Grupp: Step down.

The plaintiff rests.

The Court: Well, it seems to me that this is a fairly appropriate time for our morning recess. We will have it. Ten minutes.

(Short recess.)

Mr. Collett: I might state to the Court that I am sure we are going to finish before 12:00 if counsel does not take too long in examining the government's witnesses.

The Court: All right, we will see. [178]

Mr. Collett: Mr. Hedrick.

RAYMOND C. HEDRICK

called as a witness on behalf of the defendant; sworn.

The Clerk: Will you state your name to the Court, please?

A. Raymond C. Hedrick.

Direct Examination

By Mr. Collett:

Q. By whom are you employed, Mr. Hedrick?

A. The United States Government, Internal Revenue Bureau.

Q. And the period from July 1st, 1943, to May 2nd, 1944, by whom were you employed?

A. The Alcohol Tax Unit of the Internal Revenue Bureau.

(Testimony of Raymond C. Hedrick.)

The Court: July 1, 1943, to when?

Mr. Collett: May, 1944.

Q. How long had you been employed by the Alcohol Tax Unit?

A. Did you say how long?

Q. Yes. A. Since 1936.

Q. And when was your association with that unit terminated? A. 1945.

Q. Month? A. November.

Q. And you were reassigned or transferred, were you, to the Internal Revenue?

A. Well, I transferred to the Intelligence Unit of the Internal Revenue Service in which position I am now employed. [179]

Q. Now, in the performance of your duties in the Alcohol Tax Unit, when did you first make the acquaintance of the plaintiff in this case, Mr. Maroosis?

A. In December, approximately December 7 or 8 of 1943, I was assigned to work with an inspector to make inquiries concerning the sales of black market, black marketing in liquor.

According to my records, on December 7, December 8, I called at the liquor store, 458 Geary Street. We were assigned to make inquiries of representative liquor stores throughout the city. December 7 I talked to Mike Kosloff at this store. On December 8 Mr. Maroosis was at the store; I talked to Mr. Maroosis. That is the first time I met him, Mr. Maroosis.

(Testimony of Raymond C. Hedrick.)

Q. In the conversation that you had with Mr. Maroosis on December 8, was there any information relevant to the issue of this case? A. No, sir.

Q. After December 8th, when was your next contact with Mr. Maroosis?

A. I believe it was about December 18th.

Q. What was the subject matter of that contact?

A. Our inquiries and information given me through our records of sales submitted by wholesale liquor dealers, the form 52-b, had shown our unit that Mr. Maroosis purchased liquor in considerable quantities in the East, which was shipped out to the Pacific Coast, which liquor was not handled locally. And [180] we had been instructed to, in our inquiries, to ascertain if possible to whom this merchandise was sold.

In making such inquiries, I had occasion to go back and check with Mr. Maroosis, and I believe with Mr. Kosloff, to verify or obtain additional information concerning such sales.

Q. Was that in the month of December?

A. That carried through December and January and into the first part of February.

Q. First part of February. Did you ascertain all the information that you sought?

A. No, sir.

Q. What information didn't you get that you sought?

Mr. Grupp: I don't see the relevancy of that; I will object.

The Court: Overruled.

(Testimony of Raymond C. Hedrick.)

A. Information concerning black market liquor is very, very difficult to obtain. At times we would find cases of the types of liquor brands which Mr. Maroosis had sold, those mentioned previously, three of which, as I recall, were Ben Franklin Whisky and Silver Moon Whisky—

The Court: Benjamin Franklin?

The Witness: Benjamin Franklin.

The Court: Silver Moon.

The Witness: Silver Moon, and Captain Jack. There was another one, Black Gold, but I believe that was sold by one or [181] two others besides Mr. Maroosis. In endeavoring to trace this merchandise, we would check with the purchaser where we found evidence it had been purchased by a bar, and tried to trace the sale back to Mr. Maroosis, and it was almost impossible to obtain evidence of the direct sale by Mr. Maroosis—I say Mr. Maroosis; I mean the store at 458 Geary Street known as Joseph's, but which was often associated with Mr. Maroosis as being the manager, or operator.

Q. Every time that you went there, was Mr. Maroosis there except the first time, as you stated?

A. I don't recall Mr. Maroosis there on all occasions.

Q. What about the Ramshead Whisky, would that come into that category?

A. No, sir; that is an Alfred Hart Whisky.

The Court: Ramshead—that is not in the case.

Q. And the Three Rivers, what about it?

(Testimony of Raymond C. Hedrick.)

A. That came into the picture later.

Q. Later? A. Yes, sir.

Q. And you say the early part of February—when was your next contact with Mr. Maroosis or the store known as Joseph's, at 458 Geary?

A. From early in February until mid-March, I had other assignments. In the middle of March I came back to San Francisco and continued my inquiries concerning black market liquors, and [182] during the period, checking our 52-b records, I ascertained Mr. Maroosis had purchased 775 cases of Three Rivers Whisky.

Q. I see.

A. From the Hart Corporation, and this whisky was stored at the north branch of the San Francisco Warehouse Company.

Q. Now, as of March 31——

The Court: Stored where?

The Witness: At the north branch of the San Francisco Warehouse Company.

Q. As of April the 1st or March 31, rather, midnight, the deadline of the inventory, is that so?

A. That's right.

Q. On April 1st with regard to the three stores operated, in regard to this particular matter, 499 Haight Street, 458 Geary Street, 2066 Fillmore Street, did you make a spot check on April 1 with regard to the inventory of each store?

A. I did.

Q. Was there anyone with you?

A. Yes, sir.

(Testimony of Raymond C. Hedrick.)

Q. Who?

A. Inspector John Arisco was with me on that day.

Q. Now, you made a spot check of the three stores, 458 Geary Street, 499 Haight Street, 2066 Fillmore Street?

A. Yes, we did.

Q. What time of day was it that you went to 499 Haight Street? [183]

A. It was in the late forenoon.

Q. Late forenoon. Was the store open for business?

A. No, sir.

Q. Who was at the store in charge of it at the time?

A. I don't recall who was at the 499 Haight Street Store.

Q. Did you see anything there of 100 cases of Three Rivers whisky?

A. I did not.

Q. Did anyone present at the store advise you there was 100 cases of the Three Rivers in the basement?

Mr. Grupp: I am going to object on the ground there is no foundation laid, unless the question is asked——

The Court: Yes, I will sustain the objection unless shown there is a question asked.

Q. In making the spot check, Mr. Hedrick, what did you do?

A. We made just what the term applies, spot-checking of merchandise; rather than counting individual bottles, checking full cases of merchandise. We estimate the stock on the shelves changes very

(Testimony of Raymond C. Hedrick.)

little, and we counted 36 cases of wine and 44 cases of wine in the store; three cases of rum; six cases of gin; and three more cases of rum. I listed those in my notebook at the time.

Q. Where was all the goods, the case goods stored that you saw in the store?

A. Most of the case goods was stored behind the counter in a [184] place partitioned off for storage and over a little sort of a balcony or hanging mezzanine about that particular place on the east side of that store. It is a narrow space, it is partitioned off for storage.

Q. Did you ask anybody in the store whether or not there was any other merchandise other than what you saw?

A. I did, I asked the party in charge if there was any other merchandise in the store, any other liquor, and they said there was none.

Q. Were you aware of the fact that there was a basement in that store?

A. I think so. I was in the store before, I noticed a trap door partially covered by a table, and cases of merchandise behind the partition in a little spot that one might call a—nothing more than a storage place.

Q. When you went in the store April 1, was that trapdoor exposed or was it covered with anything?

A. I couldn't say yes or no. I don't believe it was covered up, the table sat over it and the table

(Testimony of Raymond C. Hedrick.)

was used for writing; therefore it would be open underneath the table. The trapdoor would be visible.

Q. How large a trapdoor was that?

A. It is between two and three feet in width, and approximately four, four and a half, maybe five feet long, approximately the size of the table there. I believe it is smaller than the [185] top of that table on which the rostrum (indicating).

Mr. Grupp: I think we can stipulate that is about three feet by five feet.

The Witness: It isn't quite five, four, four and a half; it is approximately that size.

Q. Were you at a later date in that basement?

A. Yes, sir.

Q. When did you go into the basement?

A. Well, after we had occasion to make the inventories, and were working on the floor stock tax question, or problem.

Q. Do you remember the date?

A. No, sir.

Q. Did you go into the basement in regard to any matter involved in this matter?

A. Merely to ascertain at that time if there was liquor in the basement.

Q. When did you first know there was any liquor in the basement?

A. Last week when Mr. Maroosis advised us that he had 100 cases stored there on April 1.

The Court: First learned last week?

(Testimony of Raymond C. Hedrick.)

The Witness: Yes, sir.

The Court: A week ago today?

The Witness: It was on Tuesday or Wednesday of last week, your Honor.

Q. Was it after getting that information that you went into the [186] basement?

A. No, sir. We made examinations of all parts of the stores during the period of that—I think I was in that store probably three or four times, and when I noticed a trapdoor back there at a later date, I asked to be allowed to examine the basement. There was nothing in it of any——

Q. Can you fix the date when you first went into the basement? A. No, sir.

Q. Was it in 1944?

A. Oh, yes; yes, sir.

Q. Was it in the month of May?

A. It would have been in the month of May.

Q. And when you went into the basement, what did you find?

A. Nothing; junk, rubbish, sticks, dirt.

Q. How did you have to get into the basement?

A. Through a trap door.

Q. Were there any stairs leading down there?

A. I believe there were some rather wobbly steps leading into that basement.

Q. Were they steep?

A. Yes; I was advised it had never been used.

Q. Could you tell from the observation of the condition of the basement as to whether or not

(Testimony of Raymond C. Hedrick.)

there had been any liquor stored within there in the past two months?

A. No, sir, I couldn't say that, nor could I say there had not [187] been.

Q. You couldn't say that on the date which was—can you fix it a little closer after May 2nd—for instance, the date you took the inventory?

A. I completed my work in that case by May 18, I believe it was, so that it was between May 2 and May 18.

Q. Between May 2 and May 18. Now, did you also make a spot check at 458 Geary Street?

A. Yes, sir.

Q. And do you recall as a result of that spot check——

The Court: When was that?

The Witness: On April 1, your Honor.

Q. The spot check is April 1, 1944?

A. Yes, sir.

Q. And do you recall, do you have any recollection of how many cases of Three Rivers Whisky was at 458 Geary?

A. We counted 178 full cases, and I believe that 3 of the cases—my notes show 180 Three Rivers Whisky, 86 per cent proof.

Q. 180 cases? A. Yes, sir.

Q. Now, on May 2, did you make an inventory, take an inventory of the merchandise at 458 Geary?

A. Yes, sir, I took such an inventory, assisted by investigator Danny Dawe, and investigator Johnnie Ure, and inspector Johnnie Coln. [188]

(Testimony of Raymond C. Hedrick.)

Q. Do you have that inventory?

A. I do. It is on the table.

Mr. Collett: I will have this marked for identification.

(Thereupon inventory was marked Defendant's Exhibit B for identification.)

Q. I show you Defendant's Exhibit B and ask you to identify that document.

A. This inventory we took at the store on May 2, part of it is in my handwriting, part of it in some other, one of the other boys' handwriting.

Q. Now, on that inventory did you list by name brands each individual item that you noted?

A. We did not.

Q. And what was your purpose in the taking of the inventory at the time?

A. To ascertain the proof gallons of the merchandise of the distilled spirits on hand in the store at the time.

Q. And this form that you used here is consistent through all the pages, is it?

A. Yes, the same form provided by our unit for such inventories.

Q. And it bears a number of different columns beginning with brand name, cases, one half pints, four-fifths pints, pints, four-fifths quarts, quarts, one-half gallons, three-quarter quarts. W. G. means——

A. That is wine gallons. [189]

Q. Wine gallons, and proof is the——

(Testimony of Raymond C. Hedrick.)

A. That is the amount of alcohol in the spirit, in the liquor.

Q. P. G.? A. Proof gallons.

Q. Proof gallons, and on all of these pages here you have a "number four," on the first page under four-fifths quarts. That means that there were four bottles of four-fifths quarts for that particular little group of some type?

A. That is covered by that.

Q. Some type of beverage, .80 wine gallons, 89 proof, and .71 gallons—— A. That is right.

Mr. Collett: I ask this be introduced in evidence.

Mr. Grupp: May I ask the witness on voir dire?

The Court: You may.

Voir Dire Examination

By Mr. Grupp:

Q. Mr. Hedrick, in the past several days while this case was pending, you recall conversations in the presence of myself and Mr. Collett, some of the other gentlemen in the room, in which we asked for permission to see and examine the inventory?

A. No, sir, I recall a conversation regarding the inventory, but can't recall that you have it for examination.

Q. Do you recall advising us that the examination of the inventory would serve no purpose, because you had used certain [190] codes to describe the type of liquors and whisky; instead of using the

(Testimony of Raymond C. Hedrick.)

brand name that you used initials and certain codes?

Mr. Collett: I am going to object; I don't think this is proper examination.

The Court: Overruled.

A. Yes, I think I made that statement to you that we had abbreviated the types of liquor. When I examined the inventory—I had kept it in my briefcase—and I examined it, I found generally we don't list the liquor at all either by initials or by abbreviations.

Q. You say generally. In no instance are you able to determine from this inventory the—Well, I notice right here now, now one of the pages toward the end there are “3 R”?

A. That is Three Rivers.

Q. Yes. Now, I notice up in the next—the last page—“5 BL.”

A. Probably Schenley Black Label that refers to.

Q. Outside of those two notations, there is nothing in this inventory from which you can determine the type of whisky or type of any liquor in that, is there?

A. Yes, the proof differs for the types of liquor, some liquors and liqueurs that have proofs that are associated with that liquor only. Otherwise your statement is correct.

Mr. Grupp: We have no objection to the introduction of that document.

The Court: That is Exhibit B, is it? Admitted.

(Testimony of Raymond C. Hedrick.)

(Thereupon Defendants' Exhibit B was received in evidence.)

Direct Examination

(Resumed)

By Mr. Collett:

Q. Can you, Mr. Hedrick, from the inventory, identify the items pertaining to Three Rivers Whisky? A. Yes, sir.

Q. Would you point them out?

A. On page 4 of the inventory No. 2, the only item on that page does have an identification mark, shows 67 cases of Three Rivers in cases. That would be—any bottles would be listed separately.

Q. Is there any way to identify the balance between 67 cases and 180 cases?

A. That was all that was in the store at this time on May 2.

Q. On May 2 that was all that was in the store at that time? A. Yes, sir.

Q. Now, after having taken the inventory, what process did you follow to endeavor to determine what the inventory might be as of April 1, 1944?

A. The practice by the Internal Revenue, by our office, for such routine floor stock tax checks was to take an inventory as of any particular day, when we took the inventory, and ascertain from the taxpayer's record the purchases and sales between that date and April 1. And from those figures we would compute what he should have on hand April 1st.

(Testimony of Raymond C. Hedrick.)

Q. And did you do that? [192]

A. We did.

Q. And what was the result of that computation?

A. As I recall, it disclosed that Mr. Maroosis—Joseph's store was overdeclared by, I believe, it has been referred to as 108 proof gallons.

Q. In the event you should have reason to question the accuracy of that procedure, what are you supposed to do then?

A. To use any other logical and reasonable method of ascertaining what merchandise should have been in the store, in the premises at that time.

Q. At that time you did not know that there were 100 cases of Three Rivers Whisky stored at 499 Haight Street?

A. No, sir, I did not.

Q. What reason did you have to question the accuracy of the inventory of April 1st that was made by plaintiff in this action, Mr. Maroosis?

Mr. Grupp: I am sorry; I didn't quite understand that question.

The Court: He wants to know what reason he had to doubt the accuracy of the inventory.

Mr. Grupp: We will object to that, your Honor. No proper foundation has been laid.

The Court: Overruled.

Mr. Grupp: On the further ground, your Honor, it is highly speculative, what reason——

The Court: Overruled.

(Testimony of Raymond C. Hedrick.)

A. I had ascertained from warehouse records and our own records, that Mr. Maroosis had 775 cases of Three Rivers Whiskey stored at the San Francisco Warehouse as of, I believe it was stored there on February 21, and that he had removed up to March 30, 375 cases of that whisky. On March 31 at about 11:45, shortly before noon in the morning, 11:20 a.m., I and inspector Arisco were driving government car past 458 Geary Street and observed parked at the store in front of the store a large truck bearing the Evans Truck Rental insignia on the truck. It was canvas covered on presumably a pipe frame over the cover, the body of the truck.

We watched the truck until 12:15 p.m., at which time the truck was driven from in front of the store to the San Francisco warehouse, the north branch warehouse, where Mr. Maroosis' whiskey was stored. At 2:15, still keeping the truck under observation, we saw the warehousemen truck from the warehouse out to the loading platform and load cartons resembling whiskey cartons into the truck. The truck left the warehouse at 3:00 o'clock—I might say that further there was a coupe driven by a man, which coupe I had seen and knew to be associated with Mr. Maroosis' store, which came to the warehouse, and the driver of the coupe and the driver of the truck had a conference while the merchandise, cartons, were being loaded on the truck.

At 3:00 o'clock the truck and the coupe left the warehouse [194] and followed a route to a garage

(Testimony of Raymond C. Hedrick.)

on Drumm Street, the Standard Garage, I believe it is on Drumm Street—that is down in the warehouse district of San Francisco towards the waterfront. The truck drove inside of the garage, and the coupe disappeared from our view from the car.

Inspector Arisco and I got out of our car and at different times walked past the garage and could see the truck parked towards the back of the garage. At 3:45 we observed some activity near the truck, and as I recall, we each took turns and walked into the entrance to the garage and saw two men, or man, I wouldn't say how many, transferring cartons from the large truck to a small black panel-bodied truck, a Dodge truck, that was parked also in the back of the garage.

At 4:15 this small Dodge truck drove from the garage and the Dodge truck, the small Dodge truck has a glass in the back doors, and we could see something that had been stacked inside the truck that was covered with an old blanket or some material. I followed this Dodge truck, left Mr. Arisco to watch the garage and saw this small black Dodge panel-bodied truck drive into the basement garage of a resident on San Bruno Avenue. I could only estimate what was in the truck, because it was impossible to identify——

The Court: Garage on what street?

The Witness: On San Bruno Avenue.

The Court: Yes. [195]

A. (Continuing): I have the address if it is material——

(Testimony of Raymond C. Hedrick.)

The Court: All right.

The Witness: 1348 and 1350 San Bruno Avenue.

The Court: You may proceed.

A. (Continuing) The driver of the truck alighted from the truck and opened the garage door and drove it inside and closed the door and I did not see that truck again for some days.

I returned to the warehouse, to the garage where the—the Standard Garage on Drumm Street, and Mr. Arisco advised me the large truck was still in the warehouse. I believe that at this time the coupe had driven away. It was here—about that time, I returned to the garage, probably about 5:00 o'clock.

At 7:15 we were still observing the Standard Garage where the truck was located. We had taken turns, I had had my lunch, Mr. Arisco was eating lunch. This large truck left the Standard Garage and proceeded to and parked almost in front of Joseph's liquor store. I kept this truck in sight; I parked as close as I could get to it and see the truck and it was very easy to identify this truck, as long as you could see it you could recognize it.

There were three or five, five or six cartons of whisky taken from the truck and loaded into automobiles parked at the curb, practically in front of the store. Otherwise I saw no other merchandise, no other cartons taken from the truck.

At about 8:15 this truck was driven from 458 Geary Street [196] and proceeded to and parked in front of 2066 Fillmore. That is Mr. Maroosis', one of Mr. Maroosis'—

(Testimony of Raymond C. Hedrick.)

The Court: What number?

The Witness: 2066 Fillmore.

A. (Continuing): I watched the truck until 8:40 p.m., kept it under observation until that time. During that period the driver of the truck went into the store at 2066 Fillmore and removed from the store four hand-truck loads of cartons resembling liquor cartons and loaded them into the truck. At 8:40, or approximately 8:40 p.m., the truck drove away from the store, and because of traffic conditions I was unable to follow the truck further.

That is the basis for my suspicions of the inventory as furnished by Mr. Maroosis for the store at 458 Geary Street. Suspected that it was not correct because on March 31, at 8:00 p.m., 8:40 p.m. I had concluded observing this truck and I proceeded back to the Standard Garage driving as fast a rate of speed as possible, as I could safely, picked up Inspector Arisco and until after 11:00 o'clock we drove from one store to another of the three and we saw no activity in either of the three stores, no lights indicating that anybody was working in these stores, and we did not see this truck any further that night.

The next day I checked the records of the automobile rental agency, the Evans Truck Rental Company, and ascertained the [197] truck had been returned to them at 11:40, just a very short period after we had discontinued our observation of the stores. I felt, therefore, it was impossible for the

(Testimony of Raymond C. Hedrick.)

merchandise to have been taken from the truck and deposited in any one of the three stores.

Mr. Grupp: Pardon me. Did you say was it possible to have done that?

The Witness: That it was impossible.

Q. Mr. Hedrick, the distance between the three stores involved driving in an automobile, how long would it take you?

A. Not over ten minutes to make the round trip.

Q. Ten minutes to make the round trip?

A. Not over that; might have been less.

Q. And you kept going around and around?

A. Well, in traffic conditions it might take 15 minutes; not longer than that. Traffic is bad on Fillmore Street.

Q. Thereafter what method did you pursue to endeavor to arrive at another or different computation of the inventory of the plaintiff's, Mr. Maroosis, on April 1?

A. There had been a floor stock tax inventory and return dated November 1, 1942. We decided then to use Mr. Maroosis' or rather, the 458 Geary Street store's inventory and return for November 1, 1942, as a basis for computing the entire purchases and sales for the store from that date to April 1, 1944. Conditions were different in 1942 and we felt that the inventory and return would be accurate on that date. [198] And we proceeded to do that. We made inquiry of wholesale liquor dealers who sold merchandise to Mr. Maroosis and arrived

(Testimony of Raymond C. Hedrick.)

at a figure which we believed was his total purchases for the period, and we checked that with Mr. Maroosis' figures, from his ledger, and were within, I believe, of \$41.00 of his ledger figures for his purchases. We then asked him for his total receipts—for the total receipts for the period.

Mr. Collett: I might state to the Court that is a figure which we are not in any dispute about, the total purchases is \$203,208.51.

The Court: All right.

Q. Mr. Hedrick, was there subsequently some question, a mistake occurring in regard to the inventory that was taken as of November 1, 1942?

A. Yes, I used in my computations the inventory for the 2066 Fillmore Street instead of the inventory for 458 Geary Street.

Q. In your original computations?

A. In my original computations.

Q. And that was subsequently corrected, was it?

A. That's right.

Q. And did it result in a refund to the taxpayer?

A. It resulted in a decrease, at least of the amount of the assessment.

Q. Resulted in a decrease in the assessment. What did you next do with regard to the—— [199]

A. Inasmuch as we had the gross receipts and the purchases, to resolve those into proof gallons.

Q. How did you obtain the gross receipts?

A. From Mr. Maroosis' own records.

Q. From his records?

(Testimony of Raymond C. Hedrick.)

A. In the case of investigation concerning his purchases, we reduced each purchase to proof gallons. We divided the total dollars and cents value of purchases by the number of proof gallons purchased and arrived at an average cost per proof gallon. According to OPA and business procedure, the sales price was cost plus one-third, and we arrived at the selling price in that manner. That gave us our \$20.93 per proof gallon.

The Court: Let's see; sales one-third over——

The Witness: The purchase price plus one-third, Your Honor, was the selling price.

Q. Now, you have the figure, starting inventory, the total purchases from November 1st, 1942, to March 31, of 1944?

A. That's right.

Q. And you had the net sales for the same period. Now, how did you get the percentage figure that you used in order to determine the percentage of distilled spirits?

A. By adding the gross receipts figure from Mr. Maroosis in order to ascertain what his distilled spirits were. We asked him for the percentage of distilled spirits sales, total sales. Mr. Maroosis advised us, he told us it was first 66 per cent, [200] and then either at the same time or very shortly thereafter he said it should be 86 per cent.

Q. And do you remember when that conversation occurred?

A. No, sir.

Q. It was subsequent to May 2?

A. Yes, sir.

(Testimony of Raymond C. Hedrick.)

Q. Do you remember who was present?

A. No, sir, I do not, except that I was never in Mr. Maroosis' store alone unless it was possibly one time. All occasions I was accompanied by an inspector or another investigator.

Q. Do you remember where it occurred?

A. No, sir.

Q. Don't remember where it occurred. What did you ask Mr. Maroosis?

A. For the percentage of his distilled spirit sales, total sales.

Q. And what was his—entirely two different conversations, were they? A. I can't recall that.

Q. Did he first tell you it was 66 per cent?

A. Yes, sir.

Q. And then when did he change it to 86?

A. Very shortly thereafter.

Q. What explanation did he give you?

A. I don't recall the conversation about it. [201]

Q. You don't recall? A. No.

Q. You don't recall that he said anything why, as to why he changed it?

A. I think he said—I shouldn't say what I think.

Q. When did you first have any knowledge that the percentage might be anything different than 86 per cent?

A. As I recall, the first time that I was aware of that, that it was being considered, was when this claim was filed and I heard about it just about two weeks ago.

(Testimony of Raymond C. Hedrick.)

Mr. Grupp: Pardon me; did I understand correctly that the witness' answer was that not until he learned of the claim, which was two weeks ago?

The Witness: That's right.

Q. You state that is when you first knew that the intention was that 96.41 per cent should be used?

A. That is my recollection; yes, sir.

Q. If you, at the time of the taking of the May 2 inventory and the information that you had then as to the other—to the reliability of that inventory, in light of what you knew of the removal of the 200 cases of March 31, if you had known that there were 100 cases stored at 499 Haight Street, what effect would that have had upon your estimation of the inventory of April 1?

A. Well, if I had been given such information by Mr. Maroosis [202] and could have considered it accurate, it is possible that the floor stock tax investigation would have ended there, by including that merchandise in the inventory.

Q. You say that even though you knew the 200 cases had been removed?

A. No, sir. I said if I could have believed it that that was true, but from my personal observation I couldn't believe, if he had told me he had 100 cases I still couldn't believe it.

Q. In light of the information you did have, by reason of the information which has now been disclosed to you, or recently disclosed to you a week ago, that there was 100 cases at 499, that further

(Testimony of Raymond C. Hedrick.)

gives you basis for regarding the inventory of April 1 unsound; is that correct? A. That's right.

Q. Would that make a further difference in your computations?

A. It would change them materially.

Q. And do you believe that a recapitulation of the assessment itself may result in a different conclusion, taking into consideration the 100 cases that wasn't accounted for?

A. It would make a difference, but I can't, from what little I have heard during this trial, I can't see where any computations can arrive at a reasonable figure.

Q. Explain that a little further, Mr. Hedrick; you mean, the second computation by virtue of the purchases and sales, that even that computation is in doubt and do not believe its [203] accuracy?

A. Yes.

Mr. Grupp: Just a minute, I object on the ground it is leading and suggestive.

The Court: Sustained. [204]

Q. Do you, from the records that have been introduced into evidence in this case, Mr. Hedrick, do you believe that it was possible to ascertain therefrom a true and correct inventory as of April 1, 1944? A. I do not.

Q. You do not.

Mr. Collett: That is all.

(Testimony of Raymond C. Hedrick.)

Cross-Examination

By Mr. Grupp:

Q. Mr. Hedrick, handing you Defendant's Exhibit B, you read from one of the pages, page 4 of the second inventory. I think you referred to it as——

A. Yes.

Q. First, 67 cases of Three Rivers—you identified that by the numeral 3 and the letter R, which is under the brand name head, did you not?

A. That's right.

Q. You notice that under the proof that 86 per cent proof, is that correct?

A. Yes.

Q. Is there any way you can determine from that, determine what the 17 cases of 86 per cent proof was?

A. No, sir.

Q. There is none. It could be Three Rivers, couldn't it?

A. Yes. [205]

Q. And the 82 cases—no, that is 88 proof—the 51 cases immediately below the 82 cases on the same page——

The Court: 17 cases 86 per cent, or 88——

Mr. Grupp: 17 cases, 86 per cent, and then following the figure 82 cases of 88 proof.

Q. Now, under the 82 cases, there are 51 cases of 86 per cent proof. Now, is there any way to determine whether or not that was Three Rivers or not?

A. There is not.

Q. So that it could be Three Rivers as well as anything else, couldn't it?

A. That is a hard question for me to answer,

(Testimony of Raymond C. Hedrick.)

because I was present when the inventory was taken and we were interested in Three Rivers Whisky and we listed Three Rivers Whisky along with all the other items, only two brands listed, one is Three Rivers. Had there been more than that one entry for Three Rivers, it would have been so designated.

Q. Mr. Hedrick, I hand you Plaintiff's Exhibit No. 31. That is your receipt for it, signed by you to Mr. Maroosis on May 2, 1944. A. Yes, sir.

Q. Referring to the written language on that receipt, the words, and which said "231 serial numbers"; is that your writing? A. Yes, sir.

Q. And did Mr. Maroosis on May 4, 1944, hand you a list of [206] serial numbers such as attached to that receipt? A. Must have.

Q. Well, he did; there is no question about it, is there? A. No, sir.

Q. Mr. Hedrick, I call your attention to the second sheet of Plaintiff's Exhibit 31 which reads:

"Below listed as the serial numbers of 231 cases of Three Rivers Whisky found at 458 Geary Street on April 1, 1944."

Now, you had at the same time that this receipt was handed to you, the inventory that Mr. Maroosis took at the store on April 1, 1944, did you not?

A. Yes, sir.

Q. Now, did you note from that inventory that all there was listed in there was approximately 176 cases of Three Rivers Whisky at Geary Street?

A. 3256 would be 271 cases.

(Testimony of Raymond C. Hedrick.)

Q. That is in the recapitulation, is it not, Mr. Hedrick?

A. I did not have the inventory, the penciled inventory; I had the typed copy.

Q. Wasn't this inventory, the penciled inventory, shown you at any time?

A. I don't recall it.

Q. Did you ask for the penciled inventory?

A. I had no reason to ask whether that was the original inventory or a recapitulation of it. [207]

Q. What was the——

A. I don't recall that the penciled inventory was ever mentioned.

Q. Did Mr. Maroosis offer you the penciled inventory to check against yours?

A. Not that I recall.

Q. When you went to the basement of the Haight Street Store, just describe what is in that basement, please.

A. My recollection——

Mr. Collett: When, if the Court please?

Mr. Grupp: Well, he was there in May, as he says—He testified he was in the store several times, in the basement.

The Court: He testified he was in the basement once some time between May 2 and May 18.

Mr. Collett: All right.

A. I am not sure of my testimony; I was in the basement and looked—I don't believe I was in that basement. I could see down through the trap door and got partially in and looked around. Seeing

(Testimony of Raymond C. Hedrick.)

nothing, I came out, just saw some junk, I don't recall; I was looking for cases, cases of whisky, cases of liquor in the basement.

Q. I would like to have you describe the basement as you remember it. Were there four walls or anything else along the walls, were there shelves down there; anything of that nature?

Mr. Collett: I object to that—— [208]

A. I can't say.

The Court: Overruled.

The Witness: I can't say about that.

Q. Didn't you see, of course, an icebox down there? A. No, sir.

Q. Don't recall it. Now, Mr. Hedrick, weren't you advised that the whiskey was locked in the walk-in icebox, because it was separate and distinct lot of liquor from the Haight Street inventory?

A. No, sir; I was never advised there was any liquor in that basement until last week.

Q. Mr. Hedrick, didn't you read, or see the inventory of Haight Street, in a recapitulation of course, an inventory of the Haight Street?

A. I probably did. Other gentlemen made a floor stock tax investigation of those other two stores. I probably saw the inventory, but only the typed copy. I never saw any penciled inventory until at this hearing.

Q. Did you ever make a demand for them?

Mr. Collett: I object to that—— A. No.

The Court: Overruled.

(Testimony of Raymond C. Hedrick.)

Q. Mr. Hedrick, you have examined these inventories in Mr. Maroosis' office?

A. I looked at them; yes, sir. [209]

Q. It was pointed out to you, was it not, where the Haight Street inventory, the physical inventory, showed 100 cases of Three Rivers in the physical possession of the Haight Street Store?

A. I see the notation in the penciled inventory. It is written in a different pencil and handwriting from the original inventory.

Q. And did you see the hundred cases in the return to the Alcohol Tax Unit in addition to the penciled inventory of 176 cases at Geary Street?

A. No, sir.

Q. Well, you examined the penciled inventory?

A. No, sir.

Q. Up here in Mr. Maroosis' office, and that showed 176 cases of Three Rivers at Geary Street, didn't it?

A. I think the return showed it in bottles, the total of 171 cases.

Q. Well, whatever—— A. Yes.

Q. But the return that was filed by Mr. Maroosis showed that *there* some 276 cases on hand for which he paid tax, did it not?

A. That is right.

Mr. Collett: I object——

The Witness: 271, I believe.

Mr. Collett: One-half. [210]

Mr. Grupp: 271½; I will stand corrected.

Q. That is what it showed? A. Yes.

(Testimony of Raymond C. Hedrick.)

Q. It showed exactly 100 cases more on his return to the Alcohol Tax Unit than is actually reflected in the penciled inventory of April 1 taken of the Geary Street store.

A. I never saw the penciled inventory until this week.

Q. But even so, it still—that is still the fact?

A. When I was in the store on April 1st, I counted 178 full cases of Three Rivers Whiskey in the store plus three part cases. That brought the total up to 180.

Q. On April 1?

A. On April 1; Saturday, April 1. I so testified previously.

Q. Mr. Hedrick, do you recall a conversation with Mr. Collett and myself yesterday in which you stated that Mr. Maroosis, that you came into the store on April 1st, that the store was closed?

A. That's right.

Q. That Mr. Maroosis was there with his crew taking inventory; remember that?

A. That's right.

Q. That was a Saturday? A. That's right.

Q. The store wasn't open for business; do you remember that? A. That's right. [211]

Q. That you walked in and with two other men and that you were in that store for about five minutes; do you remember that?

A. Something like that time, yes, sir.

Q. And in that five minutes I understood you

(Testimony of Raymond C. Hedrick.)

stood there and counted 178 full cases of Three Rivers——

A. We made the count I just gave. It only takes a few moments to count a number of squares of cases and multiply and determine the total in the pile.

Q. Did I understand you correctly, Mr. Hedrick, that in all of the time that you said you followed this truck on this Saturday you could not identify what was actually in that big truck or in the little truck?

A. They had a floppy curtain over the back, you couldn't see exactly. The curtain blew, and they got out, the two drivers in the coupe got out and rearranged the load and pulled it, tightened it down tight, tied it down.

Q. Now, Mr. Hedrick, you say that you were interested only in Three Rivers on your spot check?

A. Primarily interested in Three Rivers.

Q. Why, then, when you went to the Haight Street store, did you count 36 cases of wine, 44 cases of wine, 3 cases of rum, and 3 cases of rum?

A. That was all there was there in case goods.

Q. And in the Geary Street store there was other case goods than Three Rivers? [212]

A. Yes, sir.

Q. But you weren't—— A. I listed them.

Q. You listed other cases, too? A. Yes, sir.

Q. As of April 1st? A. Yes, sir.

Q. May we have the notes that you have read from marked for identification? Did you make

(Testimony of Raymond C. Hedrick.)

those notes at the time that you followed that truck, Mr. Hedrick?

A. About the hours?

Q. Yes. A. Yes, sir.

Q. All the notes that you have and from which you read while you were testifying, where they made at approximately the time the events related took place?

A. This actual piece of paper, this is copied from another record I did make at the time.

Q. Where is that other record?

A. It is in the notebook that is in my possession.

Q. Now, Mr. Hedrick, did I understand you correctly that the first time you were actually aware of Mr. Maroosis' claim that the figure of 86 per cent was wrong, even though he gave it to you, and that he actually—distilled spirits were 96.41 per cent, was two weeks ago? [213]

A. It is possible that that was told to me. I left the Alcohol Tax Unit shortly after May of 1944 and I have, with the exception of a short period, I have been on other work ever since. And I wasn't in the office and I don't know, I knew nothing of the majority of the correspondence that you have introduced concerning Mr. Maroosis' case and the audit made by the Andrews Company. I saw that only recently when I was called to participate in this trial.

Q. Now, Mr. Hedrick, going back now to your May 1st inventory when you checked that back as

(Testimony of Raymond C. Hedrick.)

against Mr. Maroosis' physical inventory, by considering purchases and sales between April 1 and May 2, or whenever that inventory was taken, you substantially verified Mr. Maroosis' inventory with the exception of that 108 proof gallons; is that correct?

A. It wasn't a very great difference; no, sir.

Q. So that the only question, as you here stated, was this 108 proof gallons which had been explained to you as representing 60 cases at Haight Street, would, in your opinion, have ended your investigation then and there; is that correct?

A. No, I don't believe that is correct, because this matter involved using Mr. Maroosis' total sales against the amounts that he should have received for his liquor as against the daily sales records, also bringing in some missing records, and the figures don't check out.

Q. Well, now, Mr. Hedrick, when you finally made the assessment [214] you relied on four basic figures, did you not? A. Yes.

Q. You relied on Mr. Maroosis' starting inventory as of November 1, 1944—1942? A. 1942.

Q. And you accepted Mr. Maroosis' records on that figure, did you not? A. That's right.

Q. You relied on Mr. Maroosis' gross purchases, on his purchases—total purchases?

A. I computed those for myself.

Q. All right. In relying on Mr. Maroosis' purchases, you verified his purchases through every wholesaler, did you not? A. That's right.

(Testimony of Raymond C. Hedrick.)

Q. And you came to a figure which was \$41 and some odd cents less than Mr. Maroosis'?

A. That's right.

Q. You could have missed one invoice very easily? A. Could have, yes, sir.

Q. You verified Mr. Maroosis' purchase figure was substantially correct, wasn't it?

A. Yes, sir.

Q. On his books? A. Yes, sir.

Q. You then accepted Mr. Maroosis' gross sales figure from his [215] books, didn't you?

A. Yes, sir.

Q. And you then accepted Mr. Maroosis' estimate of his proof gallonage sales of distilled spirits as against gross sales, didn't you?

A. Yes, sir.

Q. Now, if you had, at that time, been made aware of the state audit, of the 96.41 per cent, would you have used that audit in place of Mr. Maroosis' estimate or of the per cent sales here?

A. At the time the Board of Equalization audit was made, was a month or more later after my investigation was made, and at that time I probably would have taken the closing inventory as a beginning point and worked back to April 1st.

Q. You knew there was a closing inventory, then, didn't you?

A. No, sir, he sold the store just a few days after I completed my investigation.

Q. Mr. Hedrick, did I understand now correctly

(Testimony of Raymond C. Hedrick.)

that you would not have substituted the 96.41 per cent for the 86 figure if you had known of the state audit, in making your calculation?

A. If I had believed that the percentage should have been 96.41, with the information I had obtained through my investigation, I still wouldn't have used it, I wouldn't have considered it as a reliable basis for the assessment.

Q. Do you consider that the 86 was more reliable basis for the [216] assessment?

A. As related to the actual assessment; yes.

Q. Why do you think the 86, which is Mr. Maroosis' estimate, as against the actual accounting of the audit of the State Board of Equalization, which showed 96.41?

A. That brings in the information that I received during my investigation as already outlined. I had received information from a considerable number of bar owners and their associates that they had purchased whiskey from Mr. Maroosis for \$65 a case.

Mr. Grupp: We will object to that on the ground——

The Court: Overruled. You asked him why he would have accepted this as true.

Mr. Grupp: We object on the ground that it isn't responsive.

The Court: You say if he had known something, wouldn't he have accepted, and then you asked why he wouldn't and he has told you.

(Testimony of Raymond C. Hedrick.)

Mr. Grupp: I am referring to an accounting question.

The Court: Let me hear the question.

(Record read.)

The Court: Frequently on cross-examination a man hurts himself instead of helping.

Mr. Grupp: My question was directed to the acceptance—specifically to his accepting an estimate by the taxpayer as against an audit by a state bureau.

The Court: His previous answer, he didn't believe that was [217] reliable, and then you asked him why he wouldn't and he gave you the reason. It is hearsay, but you are searching into his mind—if he had known the 96 per cent that he would have accepted it, and he has told you that if he had known it he wouldn't have believed it by virtue of this investigation and this information. He says he saw some trucks. Under all the circumstances, if you are surprised, I will strike it.

Mr. Grupp: Yes, I would like to have it stricken.

Q. Mr. Hedrick, do you recall a conversation outside of the courtroom, which we had numerous conversations, you advising me that if you had known of this, existing of this state audit, that you would not have recommended the assessment?

A. No, sir. I wish to refer to the stipulation made concerning these percentages and the totals, in

(Testimony of Raymond C. Hedrick.)

that I asked you to include them before that if we accept the figure in the books as being correct for sales, it is my contention that the figure showing gross receipts for that store is incorrect, as representing sales in terms of selling prices for proof gallons——

Q. Now, Mr. Hedrick,——

A. I might add, in all our conversations, I have always maintained that if we accept the figure as correct for sales, and we have never done so.

Q. Mr. Hedrick, since two weeks ago you first learned of the state audit, have you in those two weeks checked that state audit to determine as a matter of bookkeeping why the state [218] audit is not correct?

A. That refers exactly right back to my last previous answer, if we assume that the receipts in the bank deposits of Mr. Maroosis are representative of distilled spirits sold, the selling price in the audit should be correct. And I would answer that I can not.

Q. All right. Mr. Hedrick, did I understand correctly now that even though, for the purposes of your assessment, the government assessment, that you recommend that you accept Mr. Maroosis' purchase figure and accepted his gross sales figures, that you now would not accept those same figures for the purpose of the state audit?

A. I don't know if I understand.

Q. If you don't understand the question——

(Testimony of Raymond C. Hedrick.)

The Court: I don't understand, the answer will be of no help to me.

Q. Mr. Hedrick, I understood the testimony of a moment ago to be that if you accepted the figures from Mr. Maroosis' books of gross purchases, of purchases and gross sales, that there is no question in your mind but that the state audit is correct?

A. I qualified my answer in this way. I have absolutely no question concerning the purchases; it is the sales that the—it is my contention that they do not represent sales of distilled spirits at ceiling prices.

Q. Mr. Hedrick, did you accept Mr. Maroosis' gross sale figure [219] as correct when you figured the assessment that was levied against him by the Government?

A. I wouldn't like to use correctly accepted, because there was no alternative.

Q. That is, you couldn't disprove it; is that what you mean?

A. That is a question that is a little bit hard to answer. No, I have no way of disproving the fact that he received the amount of money, 276 and something, and put that money in the bank. We accept that, that the money did go in the bank, but I do not accept that it represents merchandise sold at \$20.93 a proof gallon, which is the correct selling price.

Q. Mr. Hedrick, you stated \$20.93 as the correct basis for figuring the proof gallonage. Why did you

(Testimony of Raymond C. Hedrick.)

use the figure \$20.93 in figuring the proof gallonage against which you levy——

A. We had no other alternative, no other basis on which to make our computations.

Q. Well, then, your computations are not correct, are they, Mr. Hedrick, in your own opinion?

A. That involves a little bit more lengthy answer.

Q. Just a computation——

Mr. Collett: Let the witness answer the question.

A. (Continuing): The supervisor discussed with me on his——

The Court: You can take that out. You are to answer whether or not you consider your computations correct. You may say yes or no and give the explanation of why; don't bring in the [220] conversation of the supervisor.

The Witness: Mathematically the computations were correct.

Q. Well, but the basic figures you used, are they correct?

A. The \$20.93 represents the ceiling price for sale of the distilled spirits as purchased by Mr. Maroosis during this period. The \$276,000 represents his gross receipts per his books, with one exception, that sales figure in his books for March contains three erasures, or four erasures——

Q. That is what, please?

A. His ledger contains four erasures for the March entries, March 1944, and because of those erasures which were made before I examined the

(Testimony of Raymond C. Hedrick.)

books, it is difficult to ascertain whether those figures were the original figures or not.

Q. Did you check those figures against bank deposits for those respective dates those erasures appeared?

A. I don't deny they represent bank deposits, but the original figures are erased and substitution figures put in between, probably between the dates of April 1st and May 2nd.

Q. Mr. Hedrick, I would like to know on this basis which you figured Mr. Maroosis' inventory as of April 1st, 1943, having accepted—'44—and having accepted the basic four figures from his books, whether you now question those figures or any of them?

A. I think that computation is inaccurate.

Q. You think the computation is inaccurate?

A. That's right.

Q. And, Mr. Hedrick, would it follow as a matter of accounting that if the basic figures are incorrect that the result in which those basic figures are used, would be incorrect?

A. To that extent, yes.

Q. And incidentally, Mr. Hedrick, in your experience as investigator for the Alcohol Tax Unit and the Internal Revenue Department, can you tell us what records the average liquor dealer has, permanent records, which Mr. Maroosis does not keep in his bookkeeping system?

(Testimony of Raymond C. Hedrick.)

Mr. Collett: That is irrelevant.

The Court: Overruled. You may state his records appeared to be kept the same as the average liquor dealer records in and about San Francisco.

The Witness: I was getting crossed up. I have made a thorough investigation, or thorough investigation only of this particular liquor store. The other floor stock tax investigations that I made resulted in no complications that involved searching investigation. I am unprepared to state from experience such as you have mentioned whether his records are more or less complete than other stores.

Q. Mr. Hedrick, in calculating the proof gallonage in this store, you marked up the purchasing price, the sale price per proof gallon by $33\frac{1}{3}$ per cent?

A. Marked the purchasing price $33\frac{1}{3}$ to arrive at the sale [222] price.

Q. Yes, that would mean that you were figuring on a gross profit of 25 per cent; is that correct?

A. I couldn't state as to profit. I used what the Board of Equalization used.

Q. As a matter of accounting principle, if you marked it $33\frac{1}{3}$ up from the purchasing price to the selling price, that constitutes a 25 per cent gross?

A. That would be 25 per cent of the selling price, of the gross profit.

Q. Now, did you check Mr. Maroosis' records to determine from his records whether the amount of purchases he made as against the amount of sales

(Testimony of Raymond C. Hedrick.)

would leave him an approximate 25 per cent gross profit? A. I don't believe I did.

Q. Did you check his records to determine what gross profit he would have made if your assessment inventory figure of April 1st was accepted?

A. No, sir.

Q. Then you didn't recheck your figures in that manner at all, did you? A. No, sir.

Q. Did you make any other check to determine the correctness of your estimated inventory as against your own physical inventory of May 2nd and against Mr. Maroosis' physical inventory of [223] April 1st, other than by using the 86 per cent of the gross sales as distilled spirit sales?

A. I don't think so.

Q. You made no other check other than the acceptance of that figure, did you—no other check than acceptance of that figure from Mr. Maroosis, 86 per cent? A. No, I don't think we did.

Q. If that figure is incorrect or an improper estimate by Mr. Maroosis, then your assessment is to that extent in error; is that correct?

A. That's right.

Mr. Grupp: I have no further questions. Pardon me just a minute.

Q. Incidentally, did you make a determination of the proof gallons in the inventory of May 25, 1944?

A. No, I did not; Inspector Harer estimated that.

Q. Inspector Harer estimated that; do you know

(Testimony of Raymond C. Hedrick.)

what that estimate was?

A. 808.7 proof gallons.

The Court: Inventory of May 25——

Mr. Grupp: May 25.

The Court: Who had estimated that?

The Witness: Inspector Harer, sitting in the courtroom.

The Court: All right. Cross-examination is finished? Any redirect? [224]

Mr. Collett: Just a couple of questions, if Your Honor please.

Redirect Examination

By Mr. Collett:

Q. Mr. Hedrick, in reaching the price of 15,965, is that it —695, as the average price per proof gallon, how did you arrive at that figure in the process mathematically?

A. Every invoice that we——

The Court: Reach a price of 695——

Mr. Collett: No, 15.965 per proof gallon is an average price on which the one-third markup was made.

A. (Continuing): We listed every item of merchandise purchased in terms of the invoice, invoice numbers, wine gallons, proof and proof gallons, and totaled the proof gallons and used that as divisor for the cost price, we determined the average cost per proof gallon.

Q. Now, that was the average price that you reached depending upon——

(Testimony of Raymond C. Hedrick.)

The Court: Is there any substantial difference between the average cost of proof gallons?

Mr. Grupp: There is, Your Honor, but we are not—we never disputed that because——

The Court: No dispute here about that; in other words, I am not going to decide this case on a possible difference of proof gallons. It was not gone into on cross-examination. [225]

Mr. Collett: No, if Your Honor please, I was only going to reach one point that the determination of that proof gallonage was dependent upon the accuracy of the 26.9 net sales for the distilled spirits as related to the number of gallons actually sold. If you sell a case for \$65, it is entirely——

The Court: I agree to that, but there has, it has been agreed by this witness that as far as the purchasing price is concerned, the amount of the purchases, that he is satisfied he—there is no evidence that any sold at \$65 a gallon, or case. On motion I will strike the question as going to a minor point not in controversy and not taken up on cross-examination.

Q. Mr. Hedrick, if cases of whisky were sold in excess of the proper markup in accordance with the OPA ceilings, what effect would that have upon the figure that you concluded as the average price per proof gallon, 15,695, what effect would that have upon that computation?

Mr. Grupp: I will object, assuming something not in evidence, speculative——

The Court: Well, that would generally be true

(Testimony of Raymond C. Hedrick.)

but you entire examination of this witness, I think, makes it appropriate on redirect. You kept asking him why he didn't accept this and if he accepted it, if it wasn't so and why it wasn't so after he learned about the 96, why he didn't immediately—Objection overruled——

A. If I understand the question, the answer would be that [225-A] merchandise sold in excess of the ceiling price and the entire receipts deposited and considered as here included in the total sales divided by the proper selling price, the 20.95 would indicate more proof gallons of merchandise sold than would actually be the case.

Mr. Collett: No further questions.

Recross-Examination

By Mr. Grupp:

Q. On that last question, Mr. Hedrick, in your experience as investigator of black market operations, wouldn't you say that the black marketer did not deposit any amount received by him over and above the ceiling price of merchandise sold by him as a general rule, to his bank account or reflect it in his books?

A. That is a question that I would be unable to answer, but if the Court wishes, I think——

The Court: He asked you.

Q. I asked——

The Witness: Specifically as you put it, because I don't know what the average black market man did. I had a theory in this case that—it is merely my

(Testimony of Raymond C. Hedrick.)

own theory that I could give the Court if he so desires.

Q. I am talking about the average man on the liquor to be sold on the black market. Didn't your investigation disclose that he doesn't deposit his black market money in the bank account or reflect the sales over the ceiling in his books; [226] that was the question.

A. I haven't had close enough contact with black market sellers to answer that question. I think that the majority of them did not include their black market profits as sales and put them in their books.

Mr. Grupp: That is all. [226-A]

The Court: All right, anything further? The defense then rests?

Mr. Collett: Call Mr. Harer.

GEORGE HARER

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the Court, please?

A. George Harer.

Direct Examination

By Mr. Collett:

Q. By whom are you employed, Mr. Harer?

A. I am an inspector in the Alcohol Tax Unit, U. S. Treasury Department.

Q. How long have you been such an inspector?

A. I was since April 26, 1941.

Q. When did you first become acquainted with

(Testimony of George Harer.)

the case at issue in this court against the plaintiff, Mr. Maroosis?

A. Well, that was, as I recall, it was in November 1945.

Q. And what did you do in participation of the investigation?

A. Well, the District Supervisor assigned me to reexamine the whole case after a claim for abatement of the assessment had been filed by Mr. Maroosis. And I had no previous connection with the case at all, knew nothing about it until I received this assignment. That was the reason it was given to me for an examination, was an open mind, no prejudice whatever.

Mr. Grupp: Your Honor,—

The Court: That is stricken as self-serving.

Q. (By Mr. Collett): Did you thereafter examine any of the books of Mr. Maroosis?

A. No, not at that inspection.

Q. Did you ever examine any of the books of Mr. Maroosis?

A. Yes, I did.

Q. When?

A. In January, 1949.

Q. Where?

A. At his present office, I think it's 774 Geary Street, Silver Rail, over the Silver Rail bar. I don't think Geary, I mean Market—

Q. What books did you see?

A. Well, I saw his ledger and I saw his daily sales records from the Joseph Street Store or Joseph Liquor Store, and some invoices for purchases for

(Testimony of George Harer.)

the period between November 1, 1942 and April 1, 1944.

Q. Did you have any difficulty obtaining his books?

A. Not at the second inspection that the claim for refund—Mr. Maroosis was very cooperative, At first he was a little bit inclined to——

Mr. Grupp: Well, of course, the answer at this point suggests it is going to be——

Mr. Collett: You may strike that.

Q. Did you see all of the books which are in evidence as [228] plaintiff's exhibits?

A. Yes, I believe I saw all those books.

Q. You saw all of those books. Were there any books that are not in evidence that you did see?

A. Yes, I believe there is some books that are not in evidence that I didn't see.

The Court: Do you believe there is some evidence that you didn't see?

The Witness: I know there are some books in evidence that I did see.

The Court: All right.

Q. (By Mr. Collett): And what books that are not in evidence did you see?

Mr. Grupp: I made a statement to the court originally that I would stipulate.

The Court: That he saw the daily records sheets for January to September, inclusive, of 1943, and the month of December, 1943.

Mr. Collett: I don't think the month of December. I think he said that was March.

(Testimony of George Harer.)

The Court: Let him state it.

Q. (By Mr. Collett): Did you see the daily sales book for the month of December, 1943?

A. Yes.

Q. And in that daily sales book for the month of December did [229] you see the individual entries that were in that book? A. Yes, I did.

The Court: There was an interruption. I am interested in whether he saw the daily sales record for January to September, inclusive, of 1943?

The Witness: I can't say that I saw all of those records.

The Court: Did you see any of them?

The Witness: Yes, I did.

The Court: All right.

Q. (By Mr. Collett): Did you see any notations of sales on that daily sales book for December, 1943, recording the sale of whiskey in excess of ceiling prices?

A. Well, I can't specifically state that it was December. When did you say that it was—the first—the last quarter of October, November, or December, because I examined those in detail.

Q. Have you examined the two books that are in evidence for October and November?

A. Yes.

Q. 1943. A. I have.

Q. Did you finally find any record in those two books of any sales in excess of the ceiling prices?

A. Well, I don't believe so, because I don't know the ceiling prices for all the whiskey, but they do not appear to be [229] excessive.

(Testimony of George Harer.)

Q. What notations did you find in the records, did you find in the record book that you stated were in excess of ceiling prices?

Mr. Grupp: Pardon me just a minute. I understood there was going to be offered here, your Honor, a transcript of notes of Mr. Harer that he took at that time. Now, if he is testifying from his memory, why, that is one thing, and if he has those notations, I would like to see them.

The Court: Do you have any notations?

Q. (By Mr. Collett): Do you have any notations? A. I have no notations.

Q. Did you make notations? A. I did.

Q. What happened to the notations?

A. I am unable to locate them.

Q. When did you see them last?

A. Well, I can't state definitely. I would say six months ago is the last time I noticed them.

Q. Do you recall when you last saw them?

The Court: Well, he said about six months ago. You may proceed.

Q. (By Mr. Collett): What is your recollection as to sales that were made in daily sales book that you have testified to having seen in excess of ceiling prices? [231]

A. I saw several notations there ranging from 35 cases in a lot to a hundred cases in a lot and some of this I recall as Ram'shead whiskey.

The Court: Some what?

The Witness: Some was Ram'shead whiskey and the sales prices for that ranged from \$57 to \$65 a case.

(Testimony of George Harer.)

Q. (By Mr. Collett): Do you know what the cost of Ram'shead whiskey was during the third quarter of 1943?

A. Yes, I do, I think that the——

Mr. Grupp: Just a minute. The question if he knows the ceiling price, we will object to that.

Q. (By Mr. Collett): Do you know what the cost of Ram'shead whiskey was per case in the third quarter of, or fourth quarter of 1943; that was the question.

A. I don't believe I understand. The cost to whom?

Q. The cost to the retailer from the wholesaler.

A. It was \$29.79, if I recall correctly.

Q. And how many entries did you see in that book that you recall pertaining to Ram'shead whiskey?

Mr. Grupp: We object to that, your Honor, on the ground if they were sold according to the records then they certainly weren't on hand on April 1 and Ram'shead whiskey has never been a question here.

The Court: Overruled. There is evidence in this case indicating that there was surreptitious dealing by the [232] plaintiff and this would go to that issue.

Mr. Grupp: We will object on the ground that it isn't the best evidence.

The Court: Overruled. It is the best evidence available under the evidence. You may proceed.

(Testimony of George Harer.)

Q. (By Mr. Collett): You may answer.

A. Well, I couldn't state definitely how many I saw. I do not recall. There were numerous entries, I would say a minimum of five. I am stating it very much as a minimum, because I am positive it was more than that.

Q. And of those five entries that you recall, how many cases were involved?

A. Well, as I recall the major portion of these entries, 100 cases to the lot, even 100 cases, and I would say it was approximately 450—435 cases in that quantity.

Mr. Collett: That is all.

Cross-Examination

By Mr. Grupp:

Q. Mr. Harer, do you recall a conference in Mr. Collett's office, I think it was day before yesterday, in which all of us here, Mr. Collett, Mr. Hedrick, Mr. Maroosis, Mr. Bruch, Mr. Schiller and myself and the gentlemen sitting in the back here were present? Do you remember our meeting in Mr. Collett's office? A. Yes, I do, sir.

Q. Do you recall at that time requesting that you be permitted to examine plaintiff's exhibit No. 17, which had been withdrawn from the court by both counsel, borrowed rather, during that recess, and advising us that you wanted to compare the notes that you made from records which were miss-

(Testimony of George Harer.)

ing to determine whether those notations were in plaintiff's exhibit 17?

A. No, I don't recall that. I recall—shall I state what I recall?

Q. Just one moment. Yes, go ahead.

A. What I recall is that I wished to examine those records in—exhibit 17, and at that time I believe you asked me if I had made some notes and I told you at that time that I had those notes but I did not say that I was going to compare those notes with the record.

Q. In other words, you said you did, physically you had made some notes?

A. That's right.

Q. Of the missing records?

A. That is true.

Q. And I advised you at that time, did I not, Mr. Harer, we would be willing in view of the fact that those records were missing now to permit you to introduce those records in evidence as you stated that you made them from Mr. Maroosis' original books, didn't I?

A. That is true.

Q. You didn't at that time state you had no such records, did [234] you?

A. That is true.

Q. And however, we did, all of us, depart from Mr. Collett's office leaving you with plaintiff's exhibit 17 and other records that are here in court in evidence, some of which were not introduced in evidence, as a matter of fact, and I am sure plaintiff's exhibit 17 was not then introduced into evi-

(Testimony of George Harer.)

dence yet; we left those with you and Mr. Bruch remained behind with you to permit you to make such comparison as you wanted to make, is that correct? A. That is correct.

Q. Now, Mr. Harer, what was the ceiling price of Ram'shead whiskey?

A. Ceiling prices?

Q. Yes. A. When?

Q. In December of 1943. A. I don't know.

Mr. Grupp: That is all.

Mr. Collett: No questions.

The Court: All right, you may step down. Any further evidence from the government?

Mr. Collett: No further questions.

The Court: The defendant rests?

Mr. Collett: The defendant rests. [235]

Mr. Grupp: Plaintiff rests.

The Court: All right, gentlemen.

Certificate of Reporter

I (We,) Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 235 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ KENNETH J. PECK

/s/ RUSSELL D. NORTON

[Endorsed]: Filed March 29, 1950.

In the Southern Division of the United States District Court for the Northern District of California

No. 28965-R

Before: Hon. Lloyd L. Black,
Judge.

NICK W. MAROOSIS,

Plaintiff,

vs.

JAMES G. SMYTH, United States Collector of
Internal Revenue for the First Collection District of California,

Defendant.

PARTIAL REPORTER'S TRANSCRIPT

Saturday, November 19, 1949

Appearances:

For the United States:

C. ELMER COLLETT, ESQ.

For the Plaintiff:

MORRIS M. GRUPP, ESQ.

The Court: There are many interesting factors in this. But I will make a preliminary statement. This is not a ruling, and will not bind me. I will not be embarrassed by statements today as to what I

am inclined to think is the law if I later change my view. But preliminarily, I am considering this matter from the basis that the law is as follows:

That the burden is upon the plaintiff to show that the Government's assessment was wrong as far as the primary assessment is concerned, and if the Court, when it is through analyzing the evidence, is unable to say whether the Government is right or wrong—in other words, the Court, if his mind is balanced or confused, the Court should deny recovery as to the primary assessment.

I am assuming that the law as to the fraudulent assessment is that the evidence must be clear and convincing the taxpayer was intentionally guilty of fraud, and that the Government has the burden of so establishing or that at least the evidence, by its preponderance, must so establish to a clear and convincing degree.

No, I am assuming that the law is essentially as I have stated it. You counsel, having heard that, will know how much or how little education I need as to the law.

Now, I may say as to the facts, gentlemen, that I do not feel the preponderance of the evidence favors the plaintiff as to the primary assessment. In other words, if I am compelled to decide the case now as to the primary assessment, I would have no question; I would decide against the plaintiff. The evidence satisfies me that during some of the period before April 1, 1944, that the plaintiff and his agents were surreptitiously and corruptly dealing with distilled spirits.

Now, you can start from there. The question is—the issue then is whether or not there is clear and convincing evidence of fraud. I have no confidence in the inventory of the plaintiff as of April 1, 1944. I am satisfied that the plaintiff did not intend to deal fairly with the State Board of Equalization. He turned in a figure of about \$60,000, and there isn't a scintilla of evidence to explain why he didn't turn in about \$90,000 to the State Board. He says his bookkeeping system was the finest system in San Francisco, apparently took only a few moments to learn what his gross sales were for each month, and I am satisfied that he intended not to deal fairly with the State Board.

When he found that the State Board had ascertained the correct sales and they had used a figure of 96% he says he had a check made. That check was wholly inaccurate. He had a check made showing some \$35,000 in sales. He left out \$52,000. I can understand how he might report \$80,000 and leave out 10,000. It would be hard to understand how he would 50,000 and leave out 35,000. But it is almost incomprehensible to understand how he would report, how he would have a check made of 35,000 and leave out 52,000 in ascertaining whether or not the State was right.

Now, his check wasn't a check made to determine whether the State was right or not. His check was made for the purpose of being able to convince the State, or somebody, that 96% was nearer right than about 99%. If his figures are accurate as to the balance \$52,000 having been whisky sales then in-

stead of having paid the State on the basis of 96% he should have paid the State on the basis of about 99%. I don't know how much difference that would have been, but he didn't deal fairly with the State before they made their audit. He didn't deal fairly with the State after they made it, and he did not deal fairly with the State after the payment. I am satisfied with those things.

As to exhibit 28, is it? The \$35,000 tabulation by Mrs. Woodward is only a partial tabulation, and left out the essential portion of what he says were the sales. There has been no explanation or excuse for leaving it out. I recognize there was a sheet that has all of it. But all that sheet shows that No. 28 wasn't a fair check.

So you may go further and assume in presentation of this case that I do not have confidence in the good intent of the plaintiff.

It would be extremely difficult to cause me to enter judgment for the primary amount.

There are some issues as to the fraud assessment requiring thought. If you gentlemen wish to speedily file written memoranda, you may do so. I have listened to the evidence and the manner in which it was given and I am satisfied Mr. Hedrick told the truth completely and entirely to the best of his ability. I am satisfied that plaintiff told the truth as a witness in so far as he felt there was no other option. I am speaking plainly, no reason to dodge or evade issues here. It is a question of fraud, question of reliance on testimony. I believe Mr. Hedrick.

Mr. Grupp: Might I ask a question, Your Honor?

The Court: Yes.

Mr. Grupp: Your Honor's statement with reference to the report of 66,000 the State Board was 60,000 total figure you used——

The Court: Yes.

Mr. Grupp: Did Your Honor take into consideration the testimony of Mr. Maroosis that up until the audit of May 25 by the State Board, which is a closing audit, to check back to determine all of these matters, that they had theretofore made returns to the State on the basis of a 66 to 86%?

The Court: I recognize that. If you take 66 to 86%, the last one I think was 86, take 86% from \$90,000; it doesn't make \$60,000; 66 to 86, or an average of 76% of \$90,000, it doesn't make 60,000. I had that in mind. I am satisfied that the plaintiff wasn't endeavoring to deal fairly with the State of California. That is not before me. His dealing with the State of California is not *res judicata* to me here. From the evidence I am satisfied that the State Board of Equalization, if it arrived at an accurate figure, did it under difficulties.

It seems to me the sole issue in this case is whether under all the evidence there is clear and convincing fraud as to the inventory on April 1, 1944.

Now, if you gentlemen disagree with the law as I have briefly stated it, I will let you present written briefs speedily and I will investigate. I am satisfied neither of you will disagree to the law as

stated as to the primary assessment that the burden is on plaintiff.

Mr. Grupp: Yes, Your Honor, but I do think the law establishes there must be a rational basis for the additional assessment by the State, by the Federal Government.

The Court: I agree there must be a rational basis which rational basis must be arrived at by common sense which means the most rational basis which is available under the circumstances. Now, one of the circumstances was that on March 31 Mr. Hedrick witnessed the most marvelous transactions.

Either side wish to make argument?

Mr. Grupp: I prefer not to do it orally.

The Court: Would you like to make it in writing?

Mr. Grupp: Yes. I am going to try—might I have ten days?

The Court: No, Gentlemen, I'm leaving here at least by the 3rd of December. When I return, I return to a heavy calendar. I came down here at a very substantial sacrifice. The business in the State of Washington is much too heavy for us judges to handle. In spite of that fact, I came because—you may put this off the record.

(Off the record discussion.)

The Court: We are on the record. Plaintiff's counsel has now asked until next Friday in which to submit a written argument. He has advised the Court he doesn't care to make oral argument. The Court will give the plaintiff until next Friday, the

25th of this month, at noon, in which to serve and file written argument.

The Court will give to the defendant until and including Monday evening at 4 o'clock in which to serve and file answering argument. The Court will give the plaintiff until Tuesday the 29th, at 4 o'clock p.m., to serve and file reply. I recognize I am giving the defendant a short period, but I have given to the defendant the benefit of most of the Court's inclinations which should permit the defendant to start in preparing such law as is essential to go on from there.

Going to speak off the record for a moment, may I?

(Off the record discussion.)

The Court: On the record. The Court wishes to say that the Court has full confidence in the sincerity of Mr. Bruch. I am satisfied that his testimony was in accordance with his honest views and opinions. That doesn't necessarily mean that I am in accord with all of his conclusions. But I am sure that he testified fairly, conscientiously and to the best of his belief.

One of the reasons that I am not willing to say I am in accord with his views is that it is hard for me to accept as good bookkeeping practice meticulous itemizations of \$35,000 in sales and broad lumping of \$52,000 in sales over a given period.

But I have no quarrel with Mr. Bruch's sincerity and he is entitled to have that said by virtue of the other statement.

The times I fixed for these written arguments are rigid. I want to be able to announce, which I expect to do orally, my conclusion before I leave for parts north. I expect it to be oral although aspects of this case justify a written opinion.

As I said in the beginning, I came down here with all the work I could do, hoping to be of help to the overburdened judges of this district by reason of situations in no wise chargeable to them. It is regrettable indeed that San Francisco does not now have appointed and actually on duty, subject to reasonable vacations, the seven judges that the law authorizes.

This Court will be adjourned until 9:15 Monday morning.

Certificate of Reporter

I (We,) Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 8 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ RUSSELL D. NORTON.

[Endorsed]: Filed February 13, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28965-R

Before: Hon. Lloyd L. Black,
Judge.

NICK W. MAROOSIS,

Plaintiff,

vs.

JAMES G. SMYTH, United States Collector of
Internal Revenue for the First Collection Dis-
trict of California,

Defendant.

PARTIAL REPORTER'S TRANSCRIPT

Thursday, December 1, 1949

Appearances:

For the United States:

C. ELMER COLLETT, ESQ.

For the Plaintiff:

MORRIS M. GRUPP, ESQ.

The Clerk: Maroosis vs. Smyth, for submission
and motion to reopen.

Mr. Grupp: I don't know whether Your Honor
has read the affidavit.

The Court: I have read the affidavit, I have read all the memoranda submitted and I have spent a good deal of time in examination of the voluminous exhibits.

Mr. Grupp: Our motion, Your Honor, is primarily made for the purpose of disclosing to the Court the investigation allegedly made by the Alcohol Tax Unit and the fact that the entire story of that investigation was for some reason or other not placed before the Court at the time. In other words, as I understood Mr. Hedrick's testimony, they followed a truck out to this address on San Bruno Avenue——

The Court: Counsel, you are making a motion for reopening of the case and submitted the affidavit of David Dellari. Does the Government have any objection?

Mr. Collett: If the Court please, it is wholly incompetent, irrelevant and immaterial, as to the issues of this case. As to the affidavit of Mr. Dellari being submitted at this particular time I don't see it provides any single thing to this Court.

The Court: I will say this: That the affidavit of David Dellari will be considered as part of the evidence in this case.

Mr. Collett: Yes.

The Court: Exhibit 11, which was offered and identified concerning which I reserved ruling, being an inventory as of May—as of a date in May, 1944—in connection with the sale of the Geary Street Store to DiMaggio is admitted and it is

assumed that David Dellari has testified as set forth in his affidavit.

The matters involved in this proceeding justify a much more formal opinion than the one I am about to give. While the expression of my reason for the ruling may not be as apt as it would if put in writing, my understanding of the facts themselves is probably better now than it would be later.

Other judicial obligations of mine apart from those in connection with this assignment for the Northern District of California would make it very difficult for me to write an opinion for a considerable period.

As I see it, the issues involved in this case are substantially issues of fact. The parties seem to agree, first, that as to the main assessment made by the Collector above that reported by the taxpayer and which the taxpayer paid under the law, the burden is upon the taxpayer to show by the preponderance of the evidence that he is entitled to recover back what was paid.

The parties similarly seem to agree as to the fraud assessment that even though such was paid, that the burden, nevertheless, is still upon the Collector to establish by clear and convincing evidence that there was a wilfull fraud on the part of the taxpayer.

I have re-examined the copious notes which I took during the trial; I have analyzed the exhibits in the light of those notes; I have seriously considered

various arguments presented by counsel. As a matter of fact, I am convinced that in any event the declaration or listing or report of the taxpayer as of April 1, 1944, did not include at least approximately 200 cases of Three Rivers whisky. I am not in a position to say how much more of distilled spirits the taxpayer failed to disclose. I am convinced that the report he made was not correct and that he knew it was not correct.

The accounting system for the Geary Street Store for the period prior to April 1, 1944, was a surprising system to me. I have heard evidence that the system was in accord with good bookkeeping practices; I have given heed to the repeated argument there has been no evidence presented that other liquor stores had a better system. But I am aware first that accountants who look at records have the same attitude towards the records that the ordinary physician has towards the history of an accident given to him by a patient. The physician assumes that the history is true and correct. Ordinarily, the history is reasonably correct, subject to the ordinary, casual human frailties, where the patient has no incentive to give an untrue history. Whenever the patient has a motive for stating a history that is not in accord with the facts, the physician who relies upon the history in good faith is certainly relying on something untrue. The accountant usually accepts what are known as the permanent records as correct. And in this case the accountant of Plaintiff said he relied upon the permanent rec-

ords as correct. He made no check or analysis as to the correctness of the temporary records which were the basis of the permanent records. At least, certainly he made no such check or analysis of the temporary records, which would be foundations as would cope with the motive or incentive of the taxpayer to misrepresent the situation.

If the liquor stores generally have a system where they meticulously itemize \$200 worth of sales on a certain day, as Mr. Maroosis said were done in his store, and then lump \$2300 worth of sales with no itemization, then all of the liquor stores need drastic and radical revision of their accounting systems. I am startled by the suggestion that particulars as to \$200 or \$300 of sales, plus lumping of \$2,000 worth of sales is good accounting practice. It may be that such does not violate accounting procedure so far as it may be essential to let the taxpayer learn whether he is making money or sustaining losses, but certainly such an accounting system is of no help to a Court in learning what actually transpired.

But regardless of the accounting system, regardless of the percentage figure that should, as a synthetic proposition, be employed in an estimate, the overwhelming evidence is at least 200 cases of whisky were shunted somewhere other than to any of the three stores in which Mr. Maroosis was interested.

There is no suggestion of what actually was done with any of those 200 cases taken from the ware-

house in the afternoon of March 31, except that a few cases were most irregularly handled on the street on the evening of the 31st when they were taken from a truck to several automobiles. Whether such were black market sales or whether such transfers were for the purpose of adding to some separate stores of whisky, I do not know.

But under the evidence of the plaintiff in this case, the 100 cases of Three Rivers Whiskey, which he claims were at the Haight Street Store on April 1, were put there either on March 29th or by March 30th, so none of those 100 cases are part of the mysterious 200 cases that went hither and yon on the afternoon and evening of March 31.

I am not overlooking the affidavit of Mr. Dellari and I am assuming that the affidavit is true. In other words, he has no knowledge that any whisky was stored in his garage. His affidavit would indicate that no whisky was stored in his garage, but there isn't a syllable of evidence to the effect that the black truck didn't enter the garage and linger there until the danger of pursuit was over and didn't then travel hence to a selected storing place. As a matter of fact, the evidence, the affidavit, of Mr. Dellari is quite corroborative of Mr. Hedrick's testimony. Unless Mr. Hedrick had seen this truck go to this garage, it isn't at all understandable as to why on April 1 Mr. Dellari would be approached and the garage would be searched.

The argument of plaintiff is largely based upon the theory that the only whisky that was ever sold was Three Rivers Whisky. The evidence of the

plaintiff and the argument of his counsel suggests that whenever there was a large amount of sales on a particular day that the excess of the total over the small amount of itemized sale was Three Rivers Whisky. I have no reason to so believe.

Exhibit 28 is a very interesting exhibit. Someone went to the trouble of analyzing whisky sales to the extent of \$24,000 in the three months' period, although actually and unquestionably there had been at least \$76,000 worth of whisky sales in that three months' period. But of the \$24,000 of whisky sales analyzed, I find probably forty or fifty brands listed and of those brands, Rams Head were listed as having been sold to the extent of \$7,865.65, Silver Moon \$6,330, Three Rivers \$3,987. Therefore, Three Rivers Whisky in that three-month period was running third. The record of sales after April 1 indicates that there was a very active operation, as I remember, in Rock Creek. There is an indication that Rams Head whisky was sold, not at one-third mark-up, but at 100% mark-up in the month of December, 1943; that allowed many cases of Rams Head Whisky to be available for sale in the period preceding April 1, and permitted Three Rivers Whisky to be shunted elsewhere.

The testimony of Mr. Maroosis, relative to Exhibit 28, when given, certainly lead me to believe that this analysis by the accountant was an analysis of all of the sales for the period covered. I referred to my notes and I find that they seemed to verify the impression I had when he was giving the testi-

mony. But even if I assume that there was no intention on his part to make it seem that the \$35,000 total covered all the sales of that period, I am wholly unable to harmonize his testimony with fair dealing with the State. The contention is made to me that he turned in \$60,000 to the State as his whisky sales upon the assumption that his whisky sales were only two-thirds of his gross sales.

Casually, such fractions of two-thirds might seem to explain the grave mistake he made. But his distilled spirits sales, instead of being about \$60,000 as he reported to the State were approaching \$90,000. He must have known the unitemized \$52,000 of those gross sales were distilled spirit sales only because he says that those figures were made up of whisky sales, each one so large that his adding machine didn't have room to accommodate such. I can see where a man would make a mistake as to his beer sales, over a three months' period of about \$100, or about \$150 or \$200. But it is hard for me to understand how a man would overlook \$52,000 of straight liquor sales. And if he thought only two-thirds of \$35,000 was distilled spirits, that would give him \$24,000 plus the \$52,000 would make \$76,000.00. But actually his non-distilled spirit sales were so far away from $33\frac{1}{3}$ per cent as to lend no credence to any contention he, in good faith, estimated such as $33\frac{1}{3}$ per cent. According to the figures I have for that period, the sales of other than distilled spirits were only about 2 or 3 per cent of the gross. It is easy for someone to slightly overestimate or underestimate the business he is

doing. But $33\frac{1}{3}$ per cent was multiplying his non-distilled spirit sales by ten or fifteen. I am told that although he had about \$2,000 worth of such sales that were non-distilled spirits that he in good faith thought he had about \$30,000 worth.

The issue here is a question of fact and the question of the credibility to be allowed to various witnesses. I have no confidence in the testimony that Mr. Maroosis gave me. I only believe such as would appear had he not testified. He has said there were 100 cases of Three Rivers whisky at the Haight Street Store on April 1. He is bound by that. No portion of that 100 cases came from the 200 cases which Mr. Hedrick followed. Mr. Hedrick was well-justified using the figure 86%. That is a figure that confessedly the plaintiff told him. Actually, Mr. Maroosis probably told him in the beginning it was about 66% or two-thirds, but later he told Mr. Hedrick that his distilled spirit sales were about 86% of his gross sales. It is reasonable for Mr. Hedrick to accept that figure. Accepting that he found that there was a substantial shortage of about 1200 proof gallons. That shortage corroborated what he himself had seen. And from his personal experience he practically was compelled to know that the inventory in the store itself would not be correct on April 1st, because he knew that goods came and went somewhere, came from the warehouse and while stopping at the Fillmore Store rather than unloading, had added to the load probably enough cases to take care of what had been irregularly handled out on Geary Street.

It is difficult for me to see how the plaintiff can contend the 86% is unreasonable when he was the one that gave the figure. In using the figure 86%, Mr. Hedrick inclined as strongly as he could toward the plaintiff. Had he used 66%, the shortage would have been tremendously greater.

I recognize that the State Board assessed a certain tax and found no fraud against the plaintiff. That does not indicate to me at all that the State Board was correct. The State Board did not know about these interesting travels of the truck. In my mind, Mr. Maroosis was just more fortunate with the State than the evidence indicates to me he deserved.

I have confidence in the testimony of Mr. Hedrick. I am satisfied that his testimony is substantially correct. I am satisfied that the testimony of Mr. Harer is substantially correct; I am further satisfied that neither of them made any error except a sincere error of recollection. I am not able to say at all that the evidence disproves the assessment made by the collector. My suspicion is that in so far as the estimated shortage, on Mr. Maroosis' part in his declaration, of 1200 proof gallons was mistaken, there is at least as much reason to believe that that figure was too low, as that it was too high. I was interested in the argument made that sales of liquor, of selling prices, was irrelevant to the issue, but it cannot be gainsaid that if liquor had to be sold at \$40 a case to comply with the selling provisions and if it were sold at \$80 a case,

that for each such sale the seller would have an extra case to handle at his will without accounting.

I take it Mr. Dellari told the truth and I accepted as such his statement to the effect that he did not know any whisky was stored, and his statement further to the effect Frank O'Conner denied that he knew that any was there. But there is no reason I should believe Frank O'Conner's denial other than he denied it. But it can well be that Frank O'Conner did not know of the black truck in the San Bruno Street Garage. There are many people who knew about the traveling of this truck and where it went and none of them were offered. Plaintiff's brief does correctly say when one should offer evidence and doesn't, that it is to be reasonably presumed the evidence, if offered, would contradict rather than support the theory of that side.

Someone who drove a coupe. There were two in the truck. There was someone at the Fillmore Street Store, someone at the Standard Garage, as I remember the case. The Plaintiff must know who they were. They are not offered.

Since under the evidence the plaintiff intentionally, knowingly and deliberately hid approximately 200 cases and did not list them for the floor tax, as required, such concealment was wilful. Therefore, he is subject to the penalty.

I am sorry that I have been compelled to speak frankly in this case. But the sudden increase of sales from an average of somewhere around \$10,000 to \$12,000 more than the \$62,000 in December, 1943,

and to an average of about \$30,000 after the holidays—January, February, March of 1944, would suggest at least the explanation. The suggested explanation is that until about November, 1943, the business was conducted in accordance with the O.P.A. ceiling prices, as well as other requirements. There is at least a suspicion—it isn't necessary to the decision—that about the 1st of December, 1943, Mr. Maroosis succumbed to the temptation that overwhelmed many others than him. The records would support the theory that he did not itemize the whisky sales so that his bank accounts even if correctly kept, would not disclose how many cases were sold. Some individuals might have tried the contrary expedient of listing correctly the sales and concealing a portion of the price. And, of course, an individual could have used both.

It is not obligatory on me to decide actually whether there was or was not an excursion into the black market field. In any event, unquestionably at least 200 cases of whisky were taken out of the warehouse on March 31 and were not put in any of the three places where Mr. Maroosis claimed he kept all of his goods. The fact that none of such 200 cases were listed, destroyed the reliability of his inventory, his records and his claim of good faith.

The action is dismissed.

The Court would be remiss if it did not acknowledge much appreciation of the careful presentation by counsel on each side during the trial and afterward. I am satisfied that plaintiff's counsel and

the defendant's counsel were each at all times in entire good faith in this matter. And I am satisfied that plaintiff's counsel thinks I am completely mistaken. But necessarily, although unconsciously, he is a partisan.

I approached this case and continued during the trial with the idea that there would be no proof of bad faith and that the Court would be compelled to order repaid the penalty for fraud. I felt that the problem would be whether or not the Government was entitled to use 86% or whether it should have employed 96%. But although for a long time in the position of feeling that the defendant had a substantial burden, I was compelled by the later disclosures to conclude as I have announced.

Thank you, gentlemen.

I have been hoping to leave here for the north on Saturday of this week. I'm in a trial whose ending is uncertain. I may even be here next Monday, but in so far as counsel can agree as to submission of any documents for me for signature, I would hope that such could be submitted to me tomorrow, or mailed.

Mr. Collett: Does the Court wish the preparation of any findings of fact? I think under the Rule that the Court's opinion can stand as the findings of the Court.

The Court: I appreciate findings. You need not make them long.

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 14 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ RUSSELL D. NORTON.

[Endorsed]: Filed March 29, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or a true and correct copy of an order entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the attorney for the appellant, to wit:

Complaint to Recover Liquor Floor Taxes Illegally Collected.

Answer.

Stipulation Waiving Jury Trial.

Notice of Motion and Motion for Reopening Case.

Affidavit of David Dellari—in support of Motion to Reopen.

Stipulation.

Minute Order of December 1, 1949. Order Denying Motion to Reopen. Order Judgment Be Entered in Favor of Defendant. Order Dismissing Complaint.

Plaintiff's Objections to Defendant's Finding of Fact and Conclusions of Law.

Proposed Findings of Fact and Conclusions of Law—by Plaintiff.

Proposed Findings of Fact and Conclusions of Law—by Defendant.

Findings of Fact and Conclusions of Law.

Order Overruling Plaintiff's Objections to Findings of Fact and Conclusions of Law Made and Entered by the Court.

Judgment.

Memorandum of Costs and Disbursements.

Notice of Appeal to Circuit Court of Appeals.

Designation of Contents of Record on Appeal.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31.

Defendant's Exhibits Nos. A and B.

Reporter's Transcript for November 16, 17, 18, 19, 1949.

Partial Reporter's Transcript for November 19, 1949.

Partial Reporter's Transcript for December 1, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 28th day of April, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

No. 12530. United States Court of Appeals for the Ninth Circuit. Nick W. Maroosis, Appellant, vs. James G. Smyth, United States Collector of Internal Revenue, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed April 28, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 12530

NICK W. MAROOSIS,

Plaintiff,

vs.

JAMES G. SMYTH, United States Collector of
Internal Revenue for the First Collection Dis-
trict of California,

Defendant.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant, pursuant to Division 6 of Rule 19 of the Rules of this Court, states that the following are the points on which he intends to rely on this appeal:

I.

The Court below erred in holding that whether 86 per cent (which was a voluntary estimate of the taxpayer) or 96.41 per cent (the undisputed percentage determined by an actual audit of the State Board of Equalization of the State of California) was the correct percentage of sales of distilled spirits to total sales for the period from July 1, 1943, to March 31, 1944, was not at issue in this case.

II.

The Court below erred in holding that the testimony by appellee's witnesses of alleged suspicious acts by appellant prior to the date for taking the floor stock tax inventory required by law eliminated any need for a rational or logical basis to the arbitrary assessment of appellee.

III.

The Court below erred in holding that the issue of this case is whether or not the appellant improperly dealt with distilled spirits prior to April 1, 1944, said latter date being the date for taking the floor stock tax inventory.

IV.

The Court below erred in not holding that 96.41 per cent was the correct percentage of sales of distilled spirits to total sales for the period July 1, 1943, to March 31, 1944.

V.

The Court below erred in holding that 86 per cent as the correct percentage of sales of distilled spirits to total sales for the period July 1, 1943, to March 31, 1944, was not an unreasonable figure for the appellee to use in the assessment because the appellant had given the erroneous figure to appellee's agents and that appellant is fortunate he did not give a lower percentage to appellee, for then the assessment would have been even greater.

VI.

Notwithstanding that appellee took an actual inventory of distilled spirits on hand as of May 2, 1944, and checked the same back against purchases and sales and arrived at an inventory figure of appellant's establishment as of April 1, 1944, and notwithstanding that appellee was notified of and had available for its inspection an audit of the California State Board of Equalization which established that the appellant's correct percentage of sales of distilled spirits to total sales from July 1, 1943, to March 31, 1944, was 96.41 per cent and notwithstanding the fact that appellee was on the premises of appellant on April 1, 1944, and took spot checks of his inventory on said date and notwithstanding that appellee testified that it had the plaintiff's establishment under surveillance immediately prior to April 1, 1944, and notwithstanding that appellee's investigation of plaintiff's purchases from November 1, 1942, to March 31, 1944, disclosed that appellant's purchase records were correct and notwithstanding appellee accepted as correct for the purposes of its figures the gross sales as taken from appellant's books and records and notwithstanding that from those same records the State Board of Equalization's audit disclosed that 96.41 per cent was the correct percentage of sales of distilled spirits to total sales for the period aforementioned and finally notwithstanding that appellee failed to introduce any evidence whatsoever as to the reasonableness of his assessment, that the Court nevertheless held that the method of assess-

ment, to wit: acceptance of appellant's estimate of 86 per cent as the correct percentage of sales of distilled spirits to total sales as being the most reasonable and rational method available to the appellee is error in that the said method of the appellee had no reasonable or rational basis to it at all.

VII.

The Court erred in finding that on March 31, 1944, 200 cases of Three Rivers whiskey floor stock of appellant's store were moved by appellant from a warehouse to an unknown destination.

VIII.

The Court erred in finding that the comparison of the inventory of May 2, 1944, taken by appellee and adjusted to April 1, 1944, with plaintiff's tax return of May 1, 1944, showed a difference in over-declaration of distilled spirits by plaintiff of 108.98 proof gallons.

IX.

The Court erred in finding that the May 2, 1944, inventory taken by appellee did not confirm the inventory taken by appellant on April 1, 1944.

X.

The Court erred in disregarding the correctness of the books and records of appellant in determining the reasonableness of appellee's assessment.

XI.

The Court below erred in holding that appellant

failed to declare 1,222.85 proof gallons of distilled spirits, or any amount of distilled spirits, in his floor stock tax return filed on March 1, 1944.

XII.

The Court below erred in holding that the appellant had failed to overcome by adequate evidence the presumption that the assessment levied by the defendant was accurate and proper.

XIII.

The Court below erred in holding that the tax return filed by appellant on March 1, 1944, was false and fraudulent and made with the intent of evading the tax.

XIV.

The Court below erred in rendering judgment in favor of appellee.

XV.

The Court erred in failing to render and file a written opinion in this matter.

Dated this 3d day of May, 1950.

LEON SCHILLER, ESQ.,

MORRIS M. GRUPP, ESQ.,

By /s/ LEON SCHILLER,

/s/ MORRIS M. GRUPP,

Attorneys for Appellant.

[Endorsed]: Filed May 3, 1950.

[Title of Court and Cause.]

APPELLANT'S DESIGNATION OF
RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Appellant, pursuant to Division 6 of Rule 19 of the Rules of this Court requests that the entire transcript of the above-entitled case be printed as the transcript on appeal in the above cause.

Dated: This 3d day of May, 1950.

LEON SCHILLER, ESQ.,

MORRIS M. GRUPP, ESQ.,

By /s/ LEON SCHILLER,

/s/ MORRIS M. GRUPP,

Attorneys for Appellant.

[Endorsed]: Filed May 3, 1950.

No. 12,530

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NICK W. MAROOSIS,

Appellant,

VS.

JAMES G. SMYTH, United States Col-
lector of Internal Revenue,

Appellee.

**Appeal from the United States District Court, Northern
District of California, Southern Division.**

BRIEF FOR APPELLANT.

MORRIS M. GRUPP,

Mills Building, San Francisco 4, California,

LEON SCHILLER,

105 Montgomery Street, San Francisco 4, California,

Attorneys for Appellant.

FILED

AUG 20 1950

PAUL P. O'BRIEN,

Topical Index

	Page
Statement concerning jurisdiction	1
Statement of the case.....	2
Specification of errors	7
Summary of argument	9
The assessment was arbitrary and excessive.....	13
A. The acceptance of the 86% estimate as the correct percentage of distilled spirits sales against gross sales is arbitrary	13
B. The appellant's books and records are in order and fully disclose all information needed to determine the correctness of appellant's April 1, 1944, physical inventory	15
C. 96.41% is the correct percentage of distilled spirits sales against gross sales.....	19
D. By stipulation appellee, in effect, admits that his assessment is erroneous	24
E. Appellee contends it is incapable of calculating a true and correct inventory as of April 1, 1944. Therefore, appellee contends, in effect, that judgment must be for the appellant	27
Appellee's entire defense founded upon irrelevant and unproved suspicions	28
A. The truck movements fail to establish the concealment of any whiskey	28
B. No Three Rivers whiskey was concealed; all on hand was declared; mathematically it is proved none could have been concealed	30
C. Alleged black market activities are neither founded on the evidence nor are they material to these issues.....	34
The findings of fact of the trial court are erroneous, not based on the evidence, and are contrary to the evidence..	36

	Page
A. Finding of fact III is unsupported by the evidence and is wholly immaterial to the issues of this case.....	36
B. Finding of fact No. IV is contrary to evidence offered by appellee and undisputed by appellant.....	37
C. Finding of fact No. VI is contrary to the evidence and is not substantiated by the evidence.....	39
D. Finding of fact VII is not supported by any evidence and in effect legislates a penalty greater than that imposed by law	42
Appellant has, by a preponderance of the evidence, proved that the primary assessment is illegal.....	44
Appellee has failed to prove fraud by clear and convincing or any evidence	56
Conclusion	63

Table of Authorities Cited

Cases	Pages
A. W. Mellon, 36 BTA 977.....	57
A. W. Minyard, Par. 47,283 P-H Memo TC, 6 TCM 1137, Dec. 16,102(M)	57, 58
Arthur Ward, 7 TCM 505, Dec. 16,523(M), Par. 48,132 P-H Memo TC	48
Budd v. Commissioner of Internal Revenue (CCA-3), 43 F. (2d) 509	56
Duffin v. Lucas (CCA-6), 55 F. (2d) 786.....	56
Frank MacDonald, Par. 44,363 P-H Memo TC; 3 TCM 1191 Dec. 14,232(M)	45
Griffiths v. Commissioner of Internal Revenue (CCA-7), 50 F. (2d) 782	57
Helvering v. Taylor, 293 U.S. 507, 55 S. Ct. 287, 79 L. Ed. 623	45
Henry S. Kerbaugh, 29 BTA 1014, affirmed 74 F. (2d) 749. .	57, 58
In re Locust Bldg. Co., Inc. (CCA-2), 299 Fed. 756.	61
In re Schwann, U.S. v. Irving Trust Co. (CCA-2), 82 F. (2d) 160	52
Jennison v. Commissioner of Internal Revenue (CCA-5), 45 F. (2d) 4	57, 58
Louisville Provision Co. v. Glenn (District Court, W.D. Ken- tucky), 18 F. Supp. 423.....	53
M. W. Primm, Par. 45,078 P-H Memo TC, 4 TCM 271, Dec. 14,436(M)	57, 59
Simon Bloom, 7 TCM 517, Dec. 16,529(M), Par. 48,138 P-H Memo TC	54
T. L. Morris, Par. 42,231 P-H Memo BTA	57
The Lessee of Tucker & Thompson v. Moreland, 35 U.S. 58, 10 Pet. 58, 9 L. Ed. 345.....	62

	Page
United States v. First Wisconsin Trust Co. (CCA-7), 92 F. (2d) 840	51
W. L. Harris, 7 TCM 820, Dec. 16,688(M), Par. 48,235 P-H Memo TC	47
William Stratman, Par. 49,143 P-H Memo TC; 8 TCM 560, Dec. 17,032(M)	49

Codes

Title 28, U.S.C.A., Sec. 1340.....	1
Title 28, U.S.C.A., Sec. 1291.....	2

Statutes

Revenue Act of 1943, Sec. 308.....	27
------------------------------------	----

Texts

Black's Law Dictionary	60
------------------------------	----

No. 12,530

IN THE
United States Court of Appeals
For the Ninth Circuit

NICK W. MAROOSIS,

Appellant,

vs.

JAMES G. SMYTH, United States Col-
lector of Internal Revenue,

Appellee.

**Appeal from the United States District Court, Northern
District of California, Southern Division.**

BRIEF FOR APPELLANT.

STATEMENT CONCERNING JURISDICTION.

The complaint of the appellant herein, filed June 22, 1949, in the United States District Court for the Northern District of California, Southern Division, alleges that this action arises under the Internal Revenue Laws of the United States (Tr. p. 2). The answer of the appellee admits the jurisdictional facts (Tr. p. 19).

Jurisdiction of the District Court is based upon Title 28, U.S.C.A., Section 1340, which provides:

“The district courts shall have original jurisdiction of any civil action arising under any Act

of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court. June 25, 1948, C. 646, 62 Stat. 932.”

After trial before the Court on November 16 to 19, inclusive, 1949, and December 1, 1949, the Court rendered judgment on February 21, 1950, that the appellant take nothing from the appellee, and that appellant’s complaint be dismissed (Tr. pp. 57-58). The judgment was filed on February 25, 1950 (Tr. p. 58).

The appellant, within sixty days from the date of the entry of final judgment, and on March 24, 1950, filed Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit (Tr. p. 60).

Thereafter, the record on appeal was filed and docketed in this Court on April 28, 1950 (Tr. pp. 307-309).

Jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is based upon Title 28, U.S.C.A., Section 1291, which provides:

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court.”

STATEMENT OF THE CASE.

Appellant, as plaintiff below, brought this action to recover the primary assessment, the ad valorem

penalty and interest thereon paid appellee under protest. (Plaintiff's complaint, Tr. pp. 2-9, inclusive).

Appellee, as defendant below, by answer, put the major contentions of appellant at issue by his answer (Defendant's answer, Tr. pp. 19-22, inclusive).

Prior to April 1, 1944, appellant and a partner, Mike Kosloff, operated Joseph's, a liquor store at 458 Geary Street in San Francisco, California (Tr. p. 67).

The partnership was dissolved, and said dissolution was published (Tr. p. 68, Plaintiff's Exhibit 1, in evidence).

On April 1, 1944, appellant took sole possession of the Geary Street store (Tr. pp. 68, 69).

Appellant, on May 1, 1944, filed his liquor floor stock tax return for his Geary Street store in San Francisco (Plaintiff's complaint, Paragraph IV, Tr. p. 4; Defendant's answer, Paragraph IV, Tr. p. 20), based on an actual physical inventory taken by him as of April 1, 1944 (Tr. pp. 69, 70, 71, Plaintiff's Exhibit 2, in evidence).

Appellee's agents were, prior to April 1, 1944, suspicious of appellant. Because of this suspicion, appellee's agents spot checked the Geary Street store inventory on April 1, 1944 (Tr. pp. 235, 240).

On May 2, 1944, still because of this suspicion, appellee's agents took their own physical inventory of the Geary Street store (Tr. pp. 240, 241, Defendant's Exhibit B, in evidence). By adjusting for appel-

lant's purchases in said store from April 1, 1944, to May 2, 1944, and his sales for the same period, appellee's agents determined appellant's April 1, 1944, inventory (Tr. pp. 244, 245). This determination resulted in appellee's finding that appellant had *over-declared* his inventory in his return by some 108 proof gallons (Tr. p. 245).

Appellant explained this "over declaration" by pointing out that some sixty cases of whisky belonging to the Geary store inventory were stored elsewhere. These sixty cases wiped out the alleged overage (Tr. pp. 89, 90).

Appellee's agents were still suspicious, and *disregarded* appellant's physical inventory, *disregarded* their own "spot check" of April 1, 1944, and *disregarded* their own physical inventory taken May 2, 1944, as adjusted back to April 1, 1944.

By methods agreeable to everyone the appellee determined that between November 1, 1942, the date of a previous floor stock tax return, and March 31, 1944, appellant's starting inventory plus his purchases totaled 13,576.67 proof gallons of distilled spirits; that during the same period of time appellant's gross sales were \$276,328.51. None of these figures are questioned by appellant.

If we disregard the previous actual inventories taken by the parties, how shall we determine what portion of the 13,576.67 proof gallons were sold by appellant between November 1, 1942, and March 31, 1944? Or: If we know that the gross sales between

November 1, 1942, and March 31, 1944, were \$276,328.51, then how are we to determine: (a) What percentage of the gross sales are distilled spirits sales? and (b) How are we to reduce the determined dollar sales of distilled spirits to proof gallons?

Appellee's agents, after determining that appellant's gross sales were \$276,328.51 (which sum included sales tax) and that gross sales, exclusive of sales tax were \$269,287.26 (Tr. p. 66), *asked appellant* what percentage of his gross sales were distilled spirits. Appellant gave two answers—at first *he said 66% and later said 86% of his gross sales were distilled spirits sales* (Tr. p. 253). Appellee accepted the 86% figure and concluded that in dollar sales appellant sold \$230,720.88 worth of distilled spirits between November 1, 1942, and March 31, 1944. Dividing this \$230,720.88 by 20.93 (the *agreed* average selling price per proof gallon) appellee concluded that appellant had sold 11,023.46 proof gallons. This latter 11,023.46 proof gallon figure was then deducted from the 13,576.67 proof gallons on hand and purchased from November 1, 1942, to March 31, 1944, which left on hand as of April 1, 1944, 2,553.21 proof gallons. Appellant declared 1,330.36 proof gallons, which according to appellee's figures resulted in the alleged *under declaration of 1,222.85* proof gallons which is the basis of the assessment. (The statements in the preceding paragraphs not supported by specific citations to the record are contained in Paragraph VIII of plaintiff's complaint (Tr. p. 6), which is

admitted by defendant's answer, Paragraph VIII (Tr. p. 21).

We also note that Paragraph VIII of plaintiff's complaint alleges the addition by appellee of \$76.19 to the basic calculations "*for which no explanation was furnished the taxpayer.*" (Tr. p. 6). This \$76.19 was added to the primary assessment and a 50% penalty was added to the primary assessment (Tr. p. 6) which increased this unexplained assessment to \$117.29. All of this was *admitted* by appellee in defendant's answer, paragraph VIII (Tr. p. 21).

Appellant *sold* the Geary Street store on *May 25, 1944*, just twenty-three days after appellee took his physical inventory of appellant's store (Tr. p. 102).

On May 25, 1944, the State Board of Equalization of the State of California conducted an audit of the sales of distilled spirits of the store in question (Tr. pp. 103, 104, 105, copy of Audit, Plaintiff's Exhibit 21, in evidence).

This actual audit of the sales from appellant's books disclosed that the percentage of gross sales which constituted sales of distilled spirits was 96.41% instead of 86% as estimated by the appellant (Plaintiff's Exhibit 21, in evidence, Exhibit A to plaintiff's complaint, Tr. p. 18).

On November 9, 1945, before the assessment in dispute was paid by appellant, a copy of the said State Board of Equalization audit which discloses on its face how the 96.41% figure was reached, was mailed to the Alcohol Tax Unit together with a letter of the same date (Plaintiff's Exhibit 26, in evidence).

Notwithstanding that appellee had a copy of said audit in his possession since November 9, 1945, appellee's agent testified that he never saw that audit *until two weeks before the trial*, (November 16, 1949). For four years said audit was in possession of appellee without being seen by the agent. Said agent admitted that he did not even check that audit to determine its correctness (Tr. p. 268).

SPECIFICATION OF ERRORS.

The Statement of Points on which appellant intends to rely on appeal was filed by attorneys for appellant on May 3, 1950, and is herein incorporated by reference (Tr. pp. 310-314).

We hereby restate our specification of errors for the purpose of clarity and expediency in presenting our argument.

1. The evidence is wholly insufficient to support the judgment because the evidence proves the assessment was arbitrary and excessive.

2. The evidence is wholly insufficient to support the judgment because the appellee's entire defense was founded upon irrelevant and unproved suspicions.

3. Finding of Fact III (Tr. p. 51) is in error in that there is no evidence to support a finding that two hundred cases of Three Rivers Whisky, or any cases of any whisky, were moved by appellant from a warehouse to an unknown destination, and the finding is wholly immaterial to the issues of this case.

4. Finding of Fact IV (Tr. p. 51) is in error in that there is no evidence to support the finding that appellee's physical inventory on May 2, 1944, did not include nor account for the said 200 cases of Three Rivers Whisky, nor the finding that said inventory did not include nor account for 100 cases of Three Rivers Whisky in the basement of a store at 499 Haight Street.

5. Finding of Fact VI (Tr. p. 52) is in error in that there is no evidence to support the finding that

(a) Neither the inventory taken by appellee on May 2, 1944, as adjusted to April 1, 1944, nor the inventory taken by appellant on April 1, 1944, was true or correct.

(b) Appellant's tax return of May 1, 1944, was false and incorrect.

(c) Use by appellee of said percentage of 86% was reasonable.

(d) Such method was the most reasonable and rational one available to appellee under the circumstances.

(e) Appellee had knowledge of the diversion of 200 cases of whisky.

(f) That appellee could have no confidence in any report by plaintiff.

6. Finding of Fact VII (Tr. p. 53) is in error in that there is no evidence to support the finding that appellant knowingly, intentionally, wilfully and deliberately concealed and failed to declare in his floor

tax return the said 200 cases or any cases of whisky removed from the warehouse on March 31, 1944.

7. Conclusion of Law I (Tr. p. 53) is in error in that appellee did not properly disregard appellant's written inventory of April 1, 1944, and appellee's inventory of May 2, 1944, as adjusted back to April 1, 1944.

8. Conclusion of Law II (Tr. p. 53) is in error in that appellee's determination of appellant's under-declaration was not *reasonable*.

9. Conclusion of Law III (Tr. p. 53) is in error in that appellant has overcome the presumption that the assessment is accurate and proper.

10. Conclusion of Law IV (Tr. p. 53) is in error in that the tax return filed by appellant on May 1, 1944, was a true and correct one, and no basis exists in this case for the application of a fraud assessment, or, for that matter, a primary assessment.

11. The evidence is wholly insufficient to support in particular the judgment with regard to the fraud penalty because the burden of proof was upon appellee to establish fraud by clear and convincing evidence.

SUMMARY OF ARGUMENT.

The evidence clearly establishes that appellee's agent in computing the assessment in question relied on appellant's oral estimate that 86% of his gross sales were distilled spirits sales, whereas an actual audit of appellant's books disclosed that 96.41% of

appellant's gross sales were distilled spirits sales. The evidence further discloses that all of appellant's permanent books and records were in evidence before the Trial Court, that they are kept in a first-class manner, and that they reflect all the information necessary to an audit to determine the correct percentage of distilled spirits sales against gross sales. Such books were never audited by appellee. Nor did appellee ever check the State Board of Equalization Audit.

Appellant maintains that the use of 86%, a mere estimate by appellant, instead of the 96.41% figure reached by actual audit, is arbitrary.

The appellee stipulated that if 96.41% of the sales between July 1, 1943, and March 31, 1944, were distilled spirits sales, the assessment was in error, and yet upon proof that 96.41% of the sales during said period was distilled spirits sales, ceases to urge that 86% was the correct percentage, but instead urges the acceptance of 86% on the grounds that it is impossible to arrive at a correct computed inventory as of April 1, 1944. Appellee completely overlooks the fact that *he adopted the method of computing an inventory here in issue*, and his position that his own method is unsound is an attack *on his own assessment*.

Appellee adopted three methods of checking appellant's inventory: (1) His agents spot checked appellant's premises on April 1, 1944; (2) His agents took a physical inventory on May 2, 1944, and reconciled that inventory back to April 1, 1944; and (3) his agents made the computation here in issue. The

latter computation upon the substitution of the correct distilled spirits sales of 96.41% confirms appellant's inventory. The spot check and the May 2, 1944 inventory of appellee confirm appellant's inventory.

Faced with this, appellee contends that his own spot check and his own May 2, 1944 inventory are not accurate since they confirmed the appellant's inventory. And note he says that it is inaccurate because, in effect, he suspects he didn't count an unknown number of cases in an unknown place. The Trial Court sustained appellee's own erroneous computation here in issue because in his opinion a correct computation was impossible.

The appellee's entire position can be stated in one sentence: They suspect appellant made an incorrect return; they made an erroneous assessment based on incorrect data, based upon their suspicions; they now admit the assessment is erroneous, but they ask the Court to sustain it on the basis that no correct assessment can be made because if the Court sustains this assessment, then it will, in turn, confirm their unproved suspicions.

Whereas, the Trial Court finds that on March 31, 1944, appellant concealed some two hundred cases of whisky (which contain 412.8 proof gallons of distilled spirits), he sustained a claimed understatement of 1222.85 proof gallons.

Appellant contends with reference to the foregoing: First, that there is no evidence to support such a finding; second, that even if there were a concealment on March 31, 1944, that would not tend to estab-

lish a failure to include said distilled spirits in a return filed May 1, 1944, showing distilled spirits on hand as of April 1, 1944; third, if two hundred cases or 412.8 proof gallons were under-declared, then why sustain a contention that 1222.85 proof gallons were under-declared?

Appellee's sole allegation in his pleadings as to the reason he disregarded appellant's physical inventory upon which his return was computed, and appellee's own physical inventory can be noted from plaintiff's complaint, paragraph VI (Tr. pp. 4, 5) which was admitted in defendant's answer, paragraph VI (Tr. p. 20). There appellee alleges that the differences in the quantity of distilled spirits computed by appellee's agents "was caused by errors and omissions in the records kept by plaintiff at his place of business" (Defendant's Answer, paragraph VI, Tr. p. 20). How then can the Trial Court, without finding either for or against such an allegation, find, instead, in effect that such differences in quantity were occasioned by a concealment of two hundred cases of whisky which finding of concealment is, in turn, not supported by the evidence?

Various Findings of Fact of the Trial Court are erroneous, not based on the evidence and not supported by the evidence and in certain instances are contrary to the evidence. Such Findings of Fact are III, IV, VI and VII. Finding of Fact VII legislates a penalty greater than that imposed by law.

Appellant has sustained the burden of proof by a preponderance of evidence that the primary assess-

ment levied against him is illegal. On the other hand, appellee has failed to meet the burden of proof in his attempt to prove fraud by clear and convincing evidence.

I. THE ASSESSMENT WAS ARBITRARY AND EXCESSIVE.

From the allegations contained in paragraph VIII of plaintiff's complaint (Tr. p. 6) all of which are admitted by paragraph VIII of defendant's answer (Tr. p. 21) we must conclude that the alleged shortage constituting the basis of the assessment here in question was determined by appellee by the use of appellant's estimate that *86% of his total gross sales was distilled spirits sales.*

Is this 86% figure correct?

The basic problem in this case is as simple as that in so far as the correctness of the assessment is concerned.

If appellant has proved by a preponderance of the evidence that his own estimate of 86% is erroneous and too low, then he has proved that the assessment is arbitrary and excessive and therefore illegal.

A. The Acceptance of the 86% Estimate as the Correct Percentage of Distilled Spirits Sales Against Gross Sales Is Arbitrary.

Appellee's agent Hedrick admitted that he *made no check of appellant's 86% estimate* and admitted that if this estimate was wrong, *then the entire assessment was wrong.*

In this respect appellee's agent Hedrick testified as follows:

“Q. You made no other check other than the acceptance of that figure, did you—no other check than acceptance of that figure from Mr. Maroosis, 86 per cent?

A. No, I don't think we did.

Q. If that figure is incorrect or an improper estimate made by Mr. Maroosis, then your assessment is to that extent in error, is that correct?

A. That's right.” (Tr. p. 273).

Mr. Hedrick also testified that he did not think he made any other check to determine the correctness of his estimated inventory either as against his own physical inventory of May 2, 1944, or against appellant's inventory as of April 1, 1944, other than by the use of this 86% estimate supplied by appellant (Tr. p. 273).

The acceptance of the appellant's 86% estimate by the appellee's agent is not the normal usual course adopted by revenue agents.

The Court will recall that the appellant at first estimated his percentage of distilled spirits sales against gross sales to be 66% and later in that same conversation changed it to 86% (Tr. pp. 252-53).

Nothing could be more pointed to support the appellant's contention that the acceptance of the 86% figure is arbitrary and dependent upon the whim of the agent, than the remarks of the Trial Court in his summation at the conclusion of the case.

In this regard, the Trial Court stated:

“It is difficult for me to see how the plaintiff can contend the 86% is unreasonable when he was the one that gave the figure. In using the figure 86%, Mr. Hedrick inclined as strongly as he could toward the plaintiff. Had he used 66%, the shortage would have been tremendously greater.” (Tr. p. 303).

In effect, the Trial Court says: that the appellant is a lucky man, because by the whim of the agent, and in his arbitrary attitude, the agent chose to accept the 86% figure instead of the 66% figure. And the Trial Court indicates further that the agent could have properly accepted either one of the two figures (Tr. p. 303). The very fact that the agent could have, at his sole whim and caprice, chosen either one of the figures as the basis for his determination, and by so doing, had he chosen the 66% figure, assessed the taxpayer additional tax and penalties of \$11,794.50, plus interest, indicates the utter disregard of a taxpayer's rights when subjected to the arbitrary actions of the assessing agent.

B. The Appellant's Books and Records Are in Order and Fully Disclose All Information Needed to Determine the Correctness of Appellant's April 1, 1944 Physical Inventory.

The appellee's agent himself *admits* that his own computation of liquor on hand in appellant's store, (which is the basis of the assessment) *is incorrect* (Tr. p. 271).

Though appellee's agent Hedrick made the unwarranted statement that from the appellant's books

he did not "believe" (note: the word "believe" as distinguished from actual knowledge) that it was possible to ascertain a true inventory as of April 1, 1944 (Tr. p. 255); he admitted that when he made the final assessment he relied on four basic figures: (1) Appellant's opening inventory of November 1, 1942; (2) Appellant's gross purchases from November 1, 1942 to March 31, 1944; (3) Appellant's gross sales; and (4) Appellant's estimate that 86% of his gross sales were sales of distilled spirits (Tr. pp. 264, 265).

Agent Hedrick admitted he accepted appellant's book figures for his opening inventory (Tr. p. 264). He testified that he verified appellant's purchases through "every wholesaler," and in so doing he determined that appellant's purchases, as checked by him, were \$41.00 *less* than those reflected in appellant's books (Tr. pp. 265, 266). He admitted that on checking the wholesalers' records he could have missed one invoice (Tr. p. 266). He admitted that he "verified Mr. Maroosis' purchase figure as substantially correct" (Tr. p. 266). He admitted that he accepted appellant's book "figure" of his gross sales.

We therefore find that of the four basic figures used by appellee, the three that could be lifted bodily from appellant's books were accepted or verified by appellee. The only figure used by appellee not in the books was appellant's 86% estimate.

Why then appellee's agent testified that from appellant's books he did not "believe" a true inventory

as of April 1, 1944, could be ascertained (Tr. p. 255) is left to pure speculation.

On direct examination, the agent Hedrick admitted that the computation made by *appellee* was inaccurate; *that he did not believe its accuracy*, but made the unwarranted statement that from the appellant's records it was not possible to ascertain a true and correct inventory as of April 1, 1944 (Tr. p. 255).

Yet, on cross-examination, this very same agent when questioned relative to what records the average liquor dealer had which the appellant did not have in his bookkeeping system, answered:

"I was getting cross up. I have made a thorough investigation or thorough investigation *only of this particular liquor store*. The other floor stock tax investigations that I made resulted in no complications that involved searching investigations. *I am unprepared to state from experience such as you have mentioned whether his records are more or less complete than other stores.*"* (Tr. p. 272).

The Court will note that the agent Hedrick was never qualified by the appellee as an accountant, nor was any accountant or expert in accountancy called as a witness for the appellee.

On the other hand we have heretofore pointed out that the State Board of Equalization audit was delivered to appellee on Nov. 9, 1945 (Plaintiff's Ex. 26); that appellee never even examined that audit

*All emphasis herein are appellant's unless otherwise stated.

until two weeks before the trial (Tr. p. 268); that appellee admitted he never checked that audit (Tr. p. 268).

Yet the appellee's agent, without checking the audit, proceeds to attack it with the following bit of spicy logic:

"A. That refers exactly right back to my last previous answer, if we assume that the receipts in the bank deposits of Mr. Maroosis are representative of distilled spirits sold, the selling price in the audit *should be correct*. And I would answer that I can not." (Tr. p. 268).

The fact is that *there is not one iota of evidence* in this record that any proceeds from the sales of appellant were not deposited to his bank account. In fact Mr. Hedrick boldly admits he cannot disprove the fact that all the sale proceeds went into appellant's bank account. And he accepts that as a fact. Mr. Hedrick testified:

"Q. That is you couldn't disprove it; is that what you mean?

A. That is a question that is a little bit hard to answer. No, I have no way of disproving the fact that he received the amount of money, 276 and something, *and put that money in the bank*. *We accept that, that the money did go in the bank* but *I* do not accept that it represents merchandise sold at \$20.93 a proof gallon, which is the correct selling price." (Tr. p. 269).

Another example of an unsupported and irresponsible statement "*I do not accept*".

A Certified Public Accountant, J. Bruck, was called as a witness by appellant. His qualifications as a Certified Public Accountant were accepted by the attorney for the appellee (Tr. p. 164).

He testified that appellant kept a double entry set of books which in his opinion were complete and properly kept, and that from an examination of the records of the appellant, *he could determine the appellant's purchases, sales and his inventory as of a given period* (Tr. p. 165).

He further testified that he reviewed the method by which the State Board of Equalization arrived at the 96.41% percentage of distilled spirits sales, and that their computations were in order and in the witness' opinion, were substantially correct (Tr. p. 171); *that his check showed the correctness of said audit* (Tr. p. 172).

The witness Bruck further testified that the permanent records of the appellant were in evidence in this case as Plaintiff's Exhibit 14 (Tr. p. 181) and Plaintiff's Exhibit 17 (Tr. p. 205). There is no evidence in the record to even contradict Mr. Bruck's testimony as above set out.

C. 96.41% Is the Correct Percentage of Distilled Spirits Sales Against Gross Sales.

In referring to the State Board of Equalization audit (Plaintiff's Exhibit 21), we respectfully request that this Honorable Court refer to the Retail Distilled Spirits License Fee Audit Report, annexed

to the complaint filed in this action as Exhibit A thereto (Tr. pp. 18-19).

We call the Court's attention to the fact, that in appellee's answer, the receipt of this document by the appellee is admitted (Defendant's Answer, paragraph XI, Tr. p. 21).

An examination of the Retail Distilled Spirits License Fee Audit Report (Tr. pp. 18 and 19) discloses the following questions and answers on the report itself, which are pertinent to the issues here:

"1. What method was used to arrive at audited sales? Cost of sales plus gross profit plus sales tax.

2. If on cost plus mark-up basis:

A. What percentage of mark-up was used? (33 $\frac{1}{3}$).

B. Were inventory fluctuations considered? Yes.

* * * * *

6. Audited Distilled Spirits *sales are 96.41% of gross sales.*" (Tr. p. 18).

In determining the significance of the above quoted portions of the State Board of Equalization Report, we respectfully call to the Court's attention, the testimony of the agent Hedrick, heretofore referred to and quoted in this brief.

Appellee's agent stated in effect that it was his contention that the sales of the appellant did not represent sales of distilled spirits at ceiling prices (Tr. p. 269).

He furthermore stated, "I do not accept that it represents merchandise sold at \$20.93 a proof gallon, which is the correct selling price." (Tr. p. 269).

When we examine questions 1 and 2 and the answers thereto, above quoted from the Retail Distilled Spirits License Fee Audit Report (Tr. p. 18), we find that the State Board in determining distilled spirits sales used the $33\frac{1}{3}\%$ mark-up accepted by all of the parties to this action.

Appellant feels that the Trial Court was under the misapprehension that the 96.41 percentage figure was arbitrarily determined and then applied against the total sales to arrive at the distilled spirits sales. Actually, the State Board of Equalization made a determination of the *distilled spirits sales at ceiling* prices (using the $33\frac{1}{3}\%$ mark-up on cost of sales as accepted by all parties to this action). The 96.41% figure was then determined by dividing the total sales taken from the plaintiff's permanent records into the distilled spirits sales determined by the Board from appellant's books.

As can be noted from page 1 of the State Board of Equalization Audit (Plaintiff's Exhibit 21), they first determined the cost of goods sold for the period between July 1, 1943, and May 25, 1944. The State Board added the opening distilled spirits inventory of June 30, 1943, of \$5,912.24 to the purchase figure of \$174,722.73. The State Board then subtracted the distilled spirits inventory on May 25, 1944. Next the State Board added \$3,991.09 representing the floor tax paid on the distilled spirits inventory of April 1, 1944.

The resultant figure is the cost of distilled spirits sold during the period in question. The State Board then added \$55,282.86, which was $33\frac{1}{3}\%$ of the cost of sales, and when added to the cost of sales, resulted in the distilled spirits sales at ceiling prices. The State Board then added \$5,528.29, representing sales tax at $21\frac{1}{2}\%$ on said sales, to arrive at \$226,659.99 distilled spirits sales for the entire period (Plaintiff's Exhibit 21, in evidence).

The \$226,659.99 distilled spirits sales were segregated into quarters by the State Board of Equalization in the following manner:

For the quarter ended September 30, 1943 \$26,413.23

For the quarter ended December 31, 1943 \$87,890.50

For the quarter ended March 31, 1944 \$90,722.53

For the quarter ended June 30, 1944 \$21,631.95

(Exhibit A to plaintiff's complaint, Tr. p. 18).

The period, however, that is in issue here is July 1, 1943, to March 31, 1944. Let us therefore add the distilled spirits sales for the first three quarters listed above. The total of these three figures is \$205,025.91. This figure includes sales tax. The sales tax rate was $21\frac{1}{2}\%$ and the sales tax included in said figure was therefore \$5,000.63. When we subtract the sales tax figure from the \$205,025.91, we arrive at the distilled spirits sales, exclusive of sales tax for the period July 1, 1943, to March 31, 1944, in the amount \$200,025.68.

The gross sales exclusive of sales tax as reflected by the appellant's books between the dates of July 1, 1943 to March 31, 1944 were \$207,473.58 (Stipulation paragraph 2, Tr. p. 27). The division of this sum into the audited distilled spirits sales of \$200,025.68 results

in the 96.41%, the correct percentage of distilled spirits sales against gross sales.

It is interesting to note that the Retail Distilled Spirits License Fee Audit Reports of the State Board of Equalization (Tr. pp. 18-19), has, over the signature of the State Board of Equalization auditor, his report which contains the following statement:

“1. Method used by licensee to arrive at reported sales:

Reported sales were 60-86% of total sales”
(Tr. of record p. 19).

The significance of the foregoing quotation is that it corroborates the appellant's own estimate of his distilled spirits sales against total sales as given by him to the agent Hedrick. It establishes that the licensee, the appellant herein, reported to the State Board of Equalization that his distilled spirits sales was 60 to 86% of total sales. That was his opinion, but the State Board of Equalization, notwithstanding that opinion of the appellant, proceeded to conduct its own audit, and determined that the appellant's estimate of 60 to 86% *was incorrect* and that 96.41% *was the correct percentage* of distilled spirits sales against gross sales.

Also significant in the report of the State Board of Equalization auditor, is the following:

“Records

1. Do records meet requirements of section 24.4 of the Alcoholic Beverage Control Act and the Rules and Regulations issued thereunder?

Yes.” (Tr. p. 19).

From the foregoing quotation, it could only be inferred that the records of the appellant were such as are required by the law, from which records could be determined, the percentage of distilled spirits sales against gross sales.

In the face of the foregoing, for the appellee, throughout the negotiations between the parties prior to the trial of this action and during the trial, to have steadfastly maintained that the 86% estimate given by the appellant was the proper estimate to use is an argument bordering on the facetious.

Where the actual records of the appellant as hereinabove set forth, and the audit of the State Board of Equalization determine that 96.41% was the proper percentage of distilled spirits sales against gross sales, to arbitrarily refuse to accept such figure, without even checking said audit, or making its own audit, compels us to the conclusion that the action of the appellee is arbitrary, capricious and dependent upon the whim of the investigating agent.

D. By Stipulation Appellee, in Effect, Admits That His Assessment Is Erroneous.

A written stipulation between counsel was entered into and made a part of the record in this case, which stipulation is set forth on pages 26 to 29, inc. of the Transcript.

Paragraph 4 of the stipulation provides that if 96.41% is the correct percentage of distilled spirits sales to total sales between the period of July 1, 1943 to March 31, 1944, the distilled spirits sales would be \$200,025.28. This stipulation is as follows:

“That if the Court finds from the evidence that 96.41 per cent of the gross sales between the period of July 1, 1943, to March 31, 1944, were sales of distilled spirits that the sales of distilled spirits for the period from July 1, 1943 to March 31, 1944, would be \$200,025.28.” (Tr. p. 27).

Paragraph 6 of said stipulation provides that if the selling price per proof gallon was \$20.93, the total of distilled spirits sales would then be 12,096.75 proof gallons instead of the 11,023.46 proof gallons listed in the assessment (Tr. p. 28).

This would result in a reduction of 1,073.29 proof gallons in the appellee's calculated understatement (Paragraph 8 of Stipulation-Transcript p. 28) and would reduce that calculated understatement to 149.56 proof gallons (Paragraph 11 of Stipulation-Transcript pp. 28-29). Such an alleged understatement of 149.56 proof gallons, as provided in paragraph 12 of said stipulation, *would confirm the physical inventory taken by the appellant*, since it was stipulated in Paragraph 12 that an understatement or overstatement of approximately 1% of proof gallons purchased or sold during a given period based on a percentage calculation, *is sufficient to confirm a physical inventory* (Tr. p. 29).

(The selling price per proof gallon, \$20.93, was computed by the appellee's agent by adding $33\frac{1}{3}\%$ to the 15.695 cost price per proof gallon. $33\frac{1}{3}\%$ was the average OPA mark-up. These figures have been accepted throughout by both parties.)

This stipulation can be summarized very briefly, as follows:

If 96.41% (the State Board of Equalization figure) of the total sales between July 1, 1943, and March 1, 1944 (an amount of \$200,025.28) were distilled spirits sales, *then the entire assessment here in question is in error* and the inventory of appellant as of April 1, 1944, upon which the original return was based, *is accurate.*

The audit of the State Board of Equalization shows that the distilled spirits sales for said period were \$200,025.68, or 40¢ in excess of the stipulated figure (Written Stipulation Tr. p. 27).

The determination of distilled spirits sales by the State Board of Equalization was obviously determined at ceiling prices since the State Board of Equalization first determined the actual cost of sales, and added thereto 33 $\frac{1}{3}$ % (the accepted OPA mark-up). It must follow that the figures necessary to prove the appellant's inventory and eliminate the entire assessment have been established by the audit of the State Board of Equalization, as reviewed by appellant's Certified Public Accountant (Tr. pp. 171, 172, 173) and admittedly never even checked by appellant (Tr. p. 268).

There has never been any question but that the appellant's books correctly stated the cost of goods sold. The Alcohol Tax Unit audited all purchases by examination of invoices in the files of wholesalers, and arrived at a purchase figure \$41.00 less than that shown by the appellant's books, and the appellee's

agent admitted that he could have missed an invoice which would have accounted for the \$41.00 (Tr. pp. 251 and 265). The cost of sales figures used in the State Board of Equalization audit have been taken from the books of appellant. (Schedule 1 (appendix) shows how the cost of sales figures were taken from the books of appellant).

E. Appellee Contends He Is Incapable of Calculating a True and Correct Inventory as of April 1, 1944. Therefore, Appellee Contends, in Effect, That Judgment Must Be For the Appellant.

Appellee offers a novel defense to the assessment when he contends that it is not possible, from the records in evidence, to ascertain a true and correct inventory as of April 1, 1944 (Tr. p. 255). Section 308 of the "Revenue Act of 1943" and the regulations thereunder required appellant to file a return based on an *actual physical inventory*. The appellee seeks to prove that the physical inventory was inaccurate, and in order to do so calculated his own *computed inventory*. If the appellee believes that its computed inventory is incorrect and that it is not possible to determine a computed inventory as of April 1, 1944, then by its own admission the *method adopted by the appellee to check the physical inventory* of the appellant *is not a proper method* and should be abandoned. *It must be remembered that the computed inventory is being offered in this case by the appellee and not by the appellant.* We have already discussed the value of appellee's testimony with regard to appellant's records.

II. APPELLEE'S ENTIRE DEFENSE FOUNDED UPON IRRELEVANT AND UNPROVED SUSPICIONS.

Earlier in this brief appellants referred to the "suspicions" of the appellee's agents which resulted in their spot checking the Geary Street store on April 1, 1944, and their taking their own physical inventory of said store on May 2, 1944.

A. The Truck Movements Fail to Establish the Concealment of Any Whisky.

The "basis" for this suspicion is set forth in agent Hedrick's testimony contained in the Transcript pp. 246 to 250, in effect as follows:

On *March 31, 1944*, from 11:20 A. M. to 11 P. M. two of appellee's agents followed two trucks. One removed certain cartons "resembling whisky cartons" from a warehouse (Tr. p. 246). A panel truck was met in a garage and some "cartons" were transferred to it (Tr. p. 247). The agents saw "something" in the panel truck covered with a blanket (Tr. p. 247). The panel truck was followed to a residence garage on San Bruno Avenue in San Francisco and disappeared therein (Tr. pp. 247, 248).

The Court admitted in evidence an affidavit of Mr. Dellari, owner of the San Bruno property (Tr. p. 295). The Trial Court believed the statements in the affidavit of Dellari (Tr. p. 304). Dellari stated he knew of no whisky stored in his garage and so told appellee's agents who questioned him.

The large truck was followed to two of appellant's stores (Tr. pp. 248, 249). At one some cartons were

unloaded (Tr. p. 248). At another some were loaded on the truck (Tr. p. 249). At 11 P. M. (still March 31, 1944) they lost the truck in the traffic and did not see it again (Tr. p. 249).

The witness then stated, referring to the movements of these trucks, "That is the basis for my suspicions of the inventory as furnished by Mr. Maroosis for the store at 458 Geary Street. Suspected it was not correct" (Tr. p. 249).

Even though appellant is of the opinion that the foregoing recitation of alleged movements of liquor is far from sufficient to prove any concealment, we respectfully submit that such testimony was properly objected to by appellant and said objections were improperly overruled (Tr. p. 245).

It will be noted:

That the alleged activities of the truck were all *before* April 1, 1944, to-wit, March 31, 1944;

That not one iota of evidence was introduced which tends to establish that any liquor was stored anywhere other than at appellant's stores;

That not one bit of evidence was introduced that tended to establish that the appellee's agents actually saw or claim to have seen even one case of Three Rivers Whisky, or any other whisky, either in a truck or concealed anywhere.

Yet the Trial Court found that "on March 31, 1944, 200 cases of Three Rivers Whisky floor stock of said store at 458 Geary Street were moved by plaintiff

from a warehouse to an unknown destination" (Finding of Fact No. III, Tr. p. 51).

There is no evidence to sustain this finding.

Agent Hedrick did not mention the number "200" nor any number in his testimony relative to the truck movements.

But even if that finding were sustained by the evidence we are not here concerned with either the alleged movement or concealment of liquor for any time *either prior to, or subsequent to*, April 1, 1944. We are here concerned only with whether or not on April 1, 1944, appellant made a correct Floor Stock Tax Return. Regardless of any "suspicious" activities prior to April 1, 1944, what evidence is there that 200 cases of Three Rivers Whisky, or even one case, was concealed on April 1, 1944? We respectfully submit there is none.

B. No Three Rivers Whisky Was Concealed; All on Hand Was Declared; Mathematically It Is Proved None Could Have Been Concealed.

Appellee's agent Hedrick admitted that he and others spot checked the inventory at the Geary Street store on April 1, 1944 (Tr. pp. 235, 240). Appellee admitted taking an actual physical inventory of the Geary Street store on May 2, 1944 (Defendant's Exhibit B, in evidence, Tr. p. 240).

Appellant introduced in evidence the inventory and recap sheets of both the Geary Street store (Plaintiff's Exhibit 2, in evidence) and the Haight Street store (Plaintiff's Exhibits 3 and 4, in evidence). The

latter were brought into this case to explain the “suspicious” movement of liquor. Because of lack of storage space in the Geary Street store, appellant explained that 100 cases of Three Rivers Whisky were stored in the basement of the Haight Street store (Tr. pp. 78, 79, 80).

For a proper evaluation of these inventories we explain that Plaintiff’s Exhibit 3 is the Haight Street store actual penciled inventory (Tr. p. 77). Plaintiff’s Exhibit 4 is a “recap” of Plaintiff’s Exhibit 3 (Tr. p. 82). Plaintiff’s Exhibit 2, it will be noted, has two sections. One consists of penciled sheets, the other section is typed sheets. The penciled sheets are the actual inventory of the Geary Street store (Tr. pp. 69, 70). The typed sheets are a “recap” of the Geary Street store inventory (Tr. p. 77).

Plaintiff’s Exhibit 3, the Haight Street store inventory discloses that 100 cases of Three Rivers Whisky were physically at the Haight Street store. The typed portion of Plaintiff’s Exhibit 2 shows that *this 100 cases was figured as part of the inventory* of the Geary Street store. In substantiation of the foregoing, an examination of the Plaintiff’s Exhibits 2, 3 and 4 discloses the following with reference to this 100 cases of Three Rivers Whisky:

The *penciled* inventory of the Geary Street store contains these references to Three Rivers Whisky:

At pages	33.....	2 Fifths
“ “	36.....	2 “
“ “	36.....	163 Cases
“ “	37.....	8 “

(Plaintiff's Exhibit 2 in evidence). These items total 171 cases and four bottles, or $171\frac{1}{3}$ cases of Three Rivers Whisky.

An examination of the penciled inventory of the Haight Street store (Plaintiff's Exhibit 3 in evidence) discloses on page 9, 100 cases of Three Rivers Whisky. An examination of Plaintiff's Exhibit 4 (the recap of the Haight Street inventory), discloses that *there is no* Three Rivers Whisky listed therein. However, an examination of the "recap" of the Geary Street store inventory (typed sheets of Plaintiff's Exhibit 2), discloses, on page 10, 3,256 bottles of Three Rivers Whisky, which reduced to cases by dividing said number by twelve, equals $271\frac{1}{3}$ cases.

The Court will therefore note that the penciled inventory of the Geary Street store contains only $171\frac{1}{3}$ cases of Three Rivers Whisky, while the recap sheets of the Geary Street store contain $271\frac{1}{3}$ cases of Three Rivers Whisky. On the other hand, the penciled inventory of the Haight Street store disclosed the presence in that store of the 100 cases of Three Rivers Whisky, but the recap of the Haight Street store inventory contains *no* Three Rivers Whisky. Hence, since these 100 cases actually belonged to the Geary Street store, but were physically in the Haight Street store, and since the return in question was prepared by the appellant from his recap sheets, it is obvious that the floor stock tax on these 100 cases was paid (Tr. pp. 76-77). *Where they were located is entirely irrelevant to these issues.*

That the agent was aware that the Geary Street store had 100 cases of Three Rivers Whisky which were physically in the Haight Street store is beyond question.

Agent Hedrick admitted that on May 2, 1944 (this was the day that the agents took their own physical inventory of the Geary Street store, as evidenced by Defendant's Exhibit B) appellant handed to him and *he, Hedrick, receipted therefor*, a list containing 231 serial numbers representing 231 cases of Three Rivers Whisky at the Geary Street store as of April 1, 1944 (Tr. p. 257; Plaintiff's Exhibit 31, in evidence).

It is quite obvious that since the penciled inventory of the Geary Street store (Plaintiff's Exhibit 2) as of April 1, 1944, listed only $171\frac{1}{3}$ cases of Three Rivers Whisky, when Hedrick was furnished with a list of 231 full cases (this aside from broken case lots), he could only conclude that there must have been some Three Rivers Whisky belonging to the Geary Street store which were located somewhere else. As an agent of appellee seeking to establish an under-declaration he had a duty to investigate to determine the reason for this phenomenon.

In this regard, the appellant himself testified that when said agents took their own physical inventory and checked it back, they found appellant's return *over-declared* his liquor inventory by 108 proof gallons (Tr. p. 245).

Even though such an over-declaration benefits the appellant, he explained that he had on hand in the

Haight Street store on May 2, 1944, 60 of the original 100 cases, 40 having been moved between April 1, 1944, and May 2, 1944. These are 86 proof, which when reduced to proof gallons completely wiped out the alleged 108 proof gallon over-declaration (Tr. p. 91).

To further exemplify the danger of reliance upon suspicion and conjecture in a case of this kind, we point out that the assessment in question here covers an approximate shortage of over 1222 proof gallons, whereas the Court found only 200 cases of Three Rivers Whisky had been concealed (Finding No. III, Tr. p. 51). 200 cases, being 86 proof, when reduced to proof gallons is 412.8 proof gallons. But the assessment charges appellant with a shortage of 1222.85 proof gallons, or approximately 600 cases. The total Three Rivers Whisky purchased by the appellant was 775 cases (Tr. p. 246). He reported $271\frac{1}{3}$ cases on hand April 1, 1944, but he is in effect being charged with a shortage of 600 cases. This 600-case alleged shortage, plus the $271\frac{1}{3}$ cases reported, total $871\frac{1}{3}$ cases. Without allowing for the sale of any of this whisky during the latter part of February and all of March, 1944, the Trial Court in effect found he had on hand more Three Rivers Whisky than he ever purchased.

C. Alleged Black Market Activities Are Neither Founded on the Evidence Nor Are They Material to These Issues.

At various points in the testimony and in the statements of counsel for appellee references were made to so-called "black market operations".

When appellee's counsel questioned agent Hedrick relative to the results of his black market investigations, counsel for appellant objected on the ground that such activities were irrelevant, which objection was overruled (Tr. p. 233). Appellant still cannot see the relevancy of such testimony.

With reference to these alleged "black market operations", agent Hedrick testified that in investigating black market sales *in December of 1943*, he investigated appellant's store; that information concerning black market liquor was very difficult to obtain; and that although he "tried to trace the sale back to Mr. Maroosis, and it was almost impossible to obtain evidence of the direct sale by Mr. Maroosis—I say Mr. Maroosis, I mean the store at 458 Geary Street known as Joseph's, but which was often associated with Mr. Maroosis as being the manager, or operator" (Tr. p. 234).

Another witness for the appellee, George Harer, testified (again over the objection of appellant (Tr. p. 282), which objection appellant believes was well taken), that in December, 1943, certain books of the appellant intimated that certain sales were over ceiling, stating that from his recollection the appellant's books showed the sales of Ramshead Whisky which ranged from \$57.00 to \$65.00 a case (Tr. p. 281). He also testified that the cost of this whisky was \$29.79, "if I recall correctly" (Tr. p. 282).

No documentary evidence as to sales or costs were introduced by the appellee.

On cross-examination, however, Mr. Harer testified:

“Q. Now, Mr. Harer, what was the ceiling price of Ramshead whiskey.

A. Ceiling prices?

Q. Yes.

A. When?

Q. In December of 1943.

A. I don't know.” (Tr. 285).

There is no evidence which sustains any contention that appellant was engaged in black market activities.

III. THE FINDINGS OF FACT OF THE TRIAL COURT ARE ERRONEOUS, NOT BASED ON THE EVIDENCE, NOT SUPPORTED BY THE EVIDENCE, AND ARE CONTRARY TO THE EVIDENCE.

A. Finding of Fact III Is Unsupported by the Evidence and Is Wholly Immaterial to the Issues of This Case.

Finding of Fact No. III (Tr. p. 51), that 200 cases of Three Rivers Whiskey were on March 31, 1944 moved to an unknown destination, has already been fully covered. The testimony of the alleged movement of the liquor fails to identify one carton as whiskey—let alone Three Rivers Whiskey (Tr. pp. 246 to 250); it fails to establish that even one case was concealed or undeclared.

Then the fact, if it be such, that such movement was made on March 31, 1944 fails utterly to establish that any whiskey allegedly moved was not declared in the return filed on May 1, 1944.

B. Finding of Fact No. IV Is Contrary to Evidence Offered by Appellee and Undisputed by Appellant.

In Finding of Fact No. IV (Tr. p. 51) the Court finds: (a) that the May 2, 1944 inventory taken by appellee's agents, as adjusted back to April 1, 1944 did not account for the said 200 cases of Three Rivers Whiskey; and (b) that said inventory did not take into account the 100 cases stored at the Haight Street store. Appellant has hereinabove covered these points.

We cannot overlook the inescapable conclusion that the 100 cases of Three Rivers Whiskey were fully accounted for in the process of adjusting the appellee's May 2, 1944 inventory back for the comparison with appellant's April 1, 1944 inventory which fully listed the 100 cases in the Haight Street store (typed sheets of Plaintiff's Exhibit 2, in evidence).

From a reading of the pleadings it will be noted that *at no time before the trial did appellee* contend that appellant's alleged underdeclaration in his return was occasioned by any concealment of whiskey. To the contrary, it was contended that it was caused "by errors and omissions in the records kept by the plaintiff at his place of business" (Defendant's Answer Par. VI, Tr. p. 20).

Nowhere in the Defendant's Answer does there appear any allegation of the concealment of any whiskey (Defendant's Answer, Tr. pp. 19, 20, 21 and 22). Concealment of whiskey was not an issue before the Trial Court.

Plaintiff's Exhibit 7 in evidence is a letter received by appellant from S. H. Maloney, District Supervisor of the Alcohol Tax Unit prior to the payment of the assessment in issue. Pertinent excerpts from this letter are contained in Schedule II—Appendix.

In this letter, the Alcohol Tax Unit supports the fraud penalty on the basis of the *amount* of the alleged underdeclaration. *There is no reference whatever to the concealment of whiskey.* The Alcohol Tax Unit informs appellant that *an examination of his inventory and his records* will prove the correctness of the assessment.

It is also interesting to note that this letter refers to a proposed primary assessment of \$5,065.92, whereas the primary assessment actually made was \$3,744.74. Mr. Hedrick, agent of appellee, testified that this adjustment was necessary because he originally used as the starting inventory on November 1, 1942, the inventory of the Fillmore Street store instead of the Geary Street store (Tr. p. 251). This further exemplifies the careless approach of the agents in making the assessment.

Furthermore, if appellee knew of concealment of whiskey, then certainly the physical inventory on May 2, 1944, was a useless act since he could not hope to uncover whiskey concealed elsewhere by taking an inventory in the Geary Street store. If appellee knew of the concealment of 200 cases elsewhere, then in the computation of his inventory he would have,

with or without explanation to the taxpayer, merely added these 200 cases to that inventory.

At no point in the appellee's agent's testimony did he testify that he saw or even suspected "200" or any number of cases of "Three Rivers Whiskey" was moved or concealed.

Then again if it were true that appellant concealed 200 cases of 86 proof whiskey, which is 412.8 proof gallons, as is found by the Trial Court, then why does the Trial Court find him guilty of concealing 1222.85 proof gallons? (Finding of Fact No. VI Tr. p. 52).

Typical of the type of investigation allegedly made by the appellee's agents to determine the presence of the 100 cases of Three Rivers Whiskey at the Haight Street store is the following:

In answer to no less than six questions agent Hedrick testified that he *went into* the basement of the Haight Street store looking for whiskey (Tr. pp. 238, 239).

Later, on cross-examination, he stated:

"I don't believe I was in that basement" (Tr. p. 258), and he couldn't even describe the basement (Tr. p. 259).

C. Finding of Fact No. VI Is Contrary to the Evidence and Not Substantiated by the Evidence.

Aside from the oral estimate by appellant that his distilled spirits sales were 86% of his gross sales, there is no other evidence to the correctness or reasonableness of this 86% estimate.

In the face of the following records in this case:

(1) Plaintiff's Exhibits 14 and 17, his permanent records (Tr. p. 181);

(2) The State Board of Equalization Audit (part of Plaintiff's Exhibit 9, in evidence; Plaintiff's Exhibit 21, in evidence);

(3) Appellant's own physical inventory of the Geary Street store (Plaintiff's Exhibit 2, in evidence);

(4) Appellee's physical inventory of May 2, 1944 (Defendant's Exhibit B, in evidence) (each of which records confirms the Floor Stock Tax Return of appellant in this case);

to find that the 86% estimate of appellant is reasonable, is contrary to all the evidence.

With all due respect, appellant cannot follow the reasoning of the Trial Court as to why he found that the 86% figure was reasonable. The Trial Court explained his reasoning in the finding itself (Tr. p. 52). This, in effect, is that it was more favorable to appellant than the 66% estimate originally made by appellant. If we are to accept the logic of the Trial Court that 86% is reasonable because it is more favorable to this appellant than the use of 66%, then the adoption of the 96.41% figure is still more favorable to the appellant and therefore the still more logical figure to adopt.

With reference to the second statement of the Trial Court in Finding of Fact No. VI, to the effect that

the 86% was the most reasonable and rational one "under the circumstances" by reason of the suspicions which the agent had of appellant's activities (Tr. p. 52), we can only conclude the Trial Court did not therefore adopt the 86% figure as a correct percentage figure to use, but merely one which was adopted as a penalty by reason of the alleged suspicious actions of the appellant which came to the attention of the agent. In other words, we have the Court adopting the 86% figure, not on the basis of any actual computation, or actual evidence of correctness (Hedrick testified he never checked it at all) (Tr. p. 273), but purely as a basis for a penalty.

Further, there *is no finding* that the 96.41% figure is correct or incorrect.

In substantiation of appellant's reasoning as to the basis for the Trial Court's opinion, we cite the statement of the Trial Judge in his summation at the conclusion of the case, where he states,

"But *regardless* of the accounting system, regardless of the percentage figure that *should*, as a synthetic proposition, be employed in an estimate, the overwhelming evidence is at least 200 cases of whisky were shunted somewhere other than to any of the three stores in which Mr. Maroosis was interested." (Tr. 298)

In effect the Trial Court's decision and finding is that he finds that Mr. Maroosis, appellant, is a sinner, therefore he is to be punished for the sins by an arbitrary and baseless assessment.

We have heretofore pointed out the evidence relating to the alleged "shunting" of the 200 cases of Three Rivers Whiskey. It is interesting to note that at no time did any witness testify that any whiskey was at any time found to be at any place other than at the stores of the appellant. It is further interesting to note that not one case of whiskey was ever actually discovered unreported. Nor did appellee attempt to investigate appellant's sales after April 1, 1944, to determine the presence of such a substantial item of 1222.85 proof gallons unreported. This is particularly significant since appellant's return for this store was 1330.36 proof gallons and his alleged shortage of 1222.85 is 94.90% of his return. The under-declaration represents the equivalent of a complete store inventory.

Assessments must be based on a more firm foundation than the desire of an agent to punish one for alleged suspicious activities.

D. Finding of Fact VII Is Not Supported by Any Evidence and in Effect Legislates a Penalty Greater Than That Imposed by Law.

All of the evidence referred to in this brief is a direct denial of Finding of Fact No. VII (Tr. p. 53) which finds appellant "knowingly, intentionally, and wilfully and deliberately concealed and failed to declare * * * the said 200 cases of whisky * * *."

Appellant respectfully refers this Honorable Court to the law hereinafter cited as to the degree of proof necessary to establish the right to invoke a fraud penalty.

The proof offered as hereinabove set out not only conclusively disposes of the appellee's primary assessment but sustains fully this appellant's original return.

No evidence has proved concealment, let alone intentional or wilful or deliberate or knowing concealment.

Even in the movement of the trucks—this appellant was not named once as having anything personally to do with it. He did not take sole possession of said store until April 1, 1944 (Tr. pp. 68, 69), whereas these truck movements were on March 31, 1944.

The drivers of the trucks have never been connected as agents or employees of appellant. Their names are not even disclosed. The agents saw the truck at a warehouse loading cartons "resembling whisky cartons" (Tr. p. 246). Yet there is no evidence that these agents even made inquiry of the warehouse as to what said truck took therefrom. The truck which the agent followed to the San Bruno Avenue address was never connected with the concealment of any whisky. The large truck was never followed to any ultimate destination where whisky was removed, stored or concealed, but was lost in the traffic (Tr. p. 249). Not one bottle of liquor was proved concealed. *Furthermore the record is barren of any evidence showing that appellee's agents ever questioned appellant with regard to the alleged movement of goods on March 31, 1944. One can only conclude that appellee was far more satisfied to end his investigation with*

his suspicions unconfirmed, than he was to continue his investigation to an ultimate conclusion. Not one proof gallon was proved to be underdeclared. Yet a fraud penalty is invoked. It is a dangerous practice and one which strikes at the very fundamentals of the principles of taxation and those of enforcing penalties for fraud.

Aside from the failure of the proof to support this finding, we have the court finding appellant concealed 200 cases of Three Rivers Whiskey. As heretofore pointed out, this is 412.8 proof gallons. The primary assessment was on a 1222.85 proof gallons under-declaration. Hence, by finding a shortage of 412.8 proof gallons and approving a primary assessment and ad valorem penalty of 50%, the Trial Court in effect is approving a 300% primary assessment and 300% ad valorem penalty.

IV. APPELLANT HAS, BY A PREPONDERANCE OF THE EVIDENCE, PROVED THAT THE PRIMARY ASSESSMENT IS ILLEGAL.

In our discussion of the law with regard to arbitrary and excessive assessments, we refer to a number of decisions rendered by the United States Tax Court. We are fully aware that this is a Court of lower jurisdiction than the United States Circuit Courts of Appeals, and we do not cite these decisions with the idea that they are binding in any manner on this Court. However, the logic of these decisions is of compelling interest. Furthermore, the decisions

of the United States Tax Court discussed in our brief cited *Helvering v. Taylor*, 293 U.S. 507 for their authority.

The leading case on the subject of arbitrary assessment seems to be *Helvering v. Taylor, supra*. The Court at page 515 stated:

“But, whereas in this case the taxpayer’s evidence shows the commissioner’s determination to be arbitrary and excessive, it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him. On the facts shown by the taxpayer in this case, the Board should have held the apportionment arbitrary and the commissioner’s determination invalid.”

Various decisions support the principle set down in *Helvering v. Taylor, supra*.

In *Frank MacDonald*, Paragraph 44,363 P-H Memo TC, the taxpayer was engaged in the business of placing bets on horse races. His accountant kept a book record setting forth the amount won or lost on the day’s transactions. The taxpayer testified the record was correct. Petitioner’s books showed a gain from the business in an amount of \$1,990.75 for the year. The total amount bet during the year was \$119,529.00.

The Bureau of Internal Revenue added \$9,964.00 to the income of the taxpayer, after an audit of his return, resulting in an adjusted net income of \$11,-971.60. The Government contended that at Pari

Mutuel Racing Tracks 10% of bets was taken out for the Racing Association and that therefore it was assumed taxpayer made the same profit, and assessed him accordingly. The Government contended that daily slips of each bet should have been maintained by the taxpayer. The taxpayer admitted that the slips of each daily bet had been destroyed so that they could not be used as evidence against him on a book-making charge. The Court held for the taxpayer and said on page 1300:

“The petitioner has testified under oath that the daily slips made out by him for the year 1941 and received in evidence and the books kept by his accountant reflecting his transactions accurately and truthfully represent his gains upon his business.

“There is no claim made by the respondent that his action in the determination of a deficiency in income tax was not entirely arbitrary. He has simply assumed that the petitioner must have made a profit of at least ten per cent upon the gross bets placed with him.

“Although the respondent’s determination is *prima facie* correct and the burden of proof that it is incorrect is on the petitioner, we think that the petitioner has borne this burden of proof; we cannot assume, without any proof whatever, that a person engaged in such a business as the petitioner was engaged in has a profit of at least 10% upon bets placed with him. His sworn statement is that the net profits received by him from his horse racing business in 1941 were \$1,990.75. This is in accordance with the book records kept.”

The case of *W. L. Harris*, 7 T.C.M. 820, Dec. 16,-688 (M), presented many of the points raised in the case at bar.

The petitioner was assessed on income tax deficiencies and penalties. He was a dentist who was also engaged in other diversified activities. He had five bank accounts, and deposits were shifted from one to another. Various proceeds from bank loans also cleared through these accounts. Questioned by Internal Revenue Agents, the petitioner advised them that he paid his dental supply bills half by cash and half by check. The agent secured a signed statement from petitioner as follows:

“About half of my entire receipts are paid out in cash that is never deposited in the bank. The other half of my receipts are deposited. I do not keep any book records. The only record I keep is a card record for my dental income. Book records are kept for the hotel operation.”

Petitioner's income was then determined by the agent who relied on this signed statement.

The Court held at p. 826:

“Although the petitioner's records may have been ‘inadequate’ for precise and complete verification of his returns, this fact does not justify the respondent in determining income upon a basis which is plainly not consistent with the surrounding circumstances, and which give results absurd upon their face. The determination was without rational foundation and was arbitrary and excessive. *Helvering v. Taylor*, *supra*.”

The Court also at p. 826 pointed out that it was the duty of the agent to have made further inquiry from the bank officials and others relative to loans and other proceeds and then stated:

“Furthermore, the agent found no evidence whatever, nor was any adduced before us, that the petitioner had expended or now possesses any such sums as he is charged with receiving. The petitioner still owes over \$18,000, secured by liens on his property.”

In our case appellant has pointed out that he is charged with possession of 1222.85 proof gallons of distilled spirits on which he allegedly failed to report. Appellee, by his own spot check and physical inventory of May 2, 1944, admits there was not one proof gallon in appellant's store which he failed to report.

Appellee has failed to establish any concealment or that since April 1, 1944, appellant sold or possessed any distilled spirits not reported by him.

The case of *Arthur Ward*, 7 TCM 505, Dec. 16, 1952 (M), involved a taxpayer in the retail liquor business. The taxpayer kept a set of single entry records. The agent concluded that they were inadequate. The Bureau of Internal Revenue re-computed the taxpayer's income tax on a gross profit basis using the mark-up allowed liquor dealers by the State of South Carolina during the years in issue.

The petitioner insisted that the computation by the Bureau of Internal Revenue was based on false

assumptions, and was arbitrary and excessive. The evidence showed that he could not sell the liquor at the mark-up permitted by the state; that he had to buy four or five cases of off-brand merchandise in order to get one case of standard merchandise; and that the less desired liquors were sold at much smaller mark-up, sometimes even at a loss. The Court found for the taxpayer, and said on page 506:

“The petitioner’s evidence shows that he could not have realized the profit assumed by the respondent as the basis of the deficiencies determined. Although the records may have been inadequate for the verification of the returns, this fact does not authorize the respondent to determine the income upon a basis which is plainly not consistent with the surrounding circumstances. The determination was without rational foundation and was excessive. As such, it will not be enforced. *Helvering v. Taylor*, 293 U.S. 507 (35-1 U.S.T.C., par. 9044).”

The case of *Williams Stratman*, par. 49,143 P-H Memo T.C., involved a taxpayer who conducted a tavern. The facts showed that the taxpayer’s knowledge of methods of bookkeeping was inadequate. The only record he kept was a small journal in which he entered readings of the cash register. The agent for the Bureau of Internal Revenue determined the income of the taxpayer on the basis of the average mark-up of other taverns in the same town.

However, the evidence of the petitioner showed that he followed a liberal policy of giving free drinks to

customers, that he did not require deposits on beer cases, even though he was charged \$1.25 per each case, and that failure to return the cases would considerably reduce his profits. Furthermore, the petitioner extended credit in the taxable years, and debts of at least \$400.00 incurred at that time were still outstanding. Further, drinks were priced below OPA limits. The Court said on page 486:

“The preponderance of the evidence satisfies us that petitioner’s mark-up was so low, and that his operations were so unbusinesslike, consistent as they were with his apparent incapacity to cope with the problem of keeping the business books, that they resulted in large discrepancies between amounts he should have received, even on the basis of a moderate mark-up, and amounts actually collected. Whether we say that the evidence convinces us that there is no deficiency, or that at least petitioner has made a sufficient showing to shift the burden of going forward to respondent, see *Kern v. Poe*, (D.C.), 8 Fed. Supp. 942 (14 A.F.T.R. 1065); *B. F. Edwards*, 39 B.T.A. 735, Acq. 1939-1 C.B. 11, the conclusion remains as set forth in our findings, that on the record before us, petitioner had no net income from his tavern, and that accordingly his failure to report any was consistent with his actual operations.”

The Court further said on page 486:

“We do not have to say here, as was held in *Helvering v. Taylor*, 293 U.S. 507 (14 A.F.T.R. 1194), that respondent’s determination of the deficiency in controversy was arbitrary, and that as

a consequence no burden rests upon petitioner to demonstrate with exactitude the income which he did receive. See Wolder, 'Limitations on the Commissioner's Power,' *Taxes*, January 1949, pp. 22, 25. But we are satisfied that by the methods used respondent arrived at an excessive figure, and that petitioner's mark-up was not even in the general neighborhood of that employed by the Revenue Agent. See G. A. Miller, 6 B.T.A. 401."

The case of *United States v. First Wisconsin Trust Co.*, (C.C.A. 7) 92 F. (2d) 840, was brought to recover taxes illegally assessed and collected. The Government sought to introduce evidence to the effect that the taxpayer had received certain income that had not been reported. However, there had been no pleading by the Government defendant as to those facts.

The Government contended that no special pleading was necessary, on the theory that the plaintiff taxpayer, in order to recover the tax paid, has the general burden of proving himself not indebted to the Government. The Court, rejecting this argument, held on page 845:

"Of course, Government's counsel did not intend to mislead the court by stating that the proffered amendment raised no issue. His contention was, and is now, that the issue specifically raised by the last amendment was present *ab initio*, and that it was really unnecessary for the government to plead it specially. In other words, it contends that the burden was upon appellees in the first instance to prove that their decedent was not otherwise indebted to the Govern-

ment before they could recover the erroneous payment for which they sued, in case such payment was found to be erroneous. We think this contention is not supported by reason or authority. In *Helvering v. Taylor*, 293 U.S. 507, 55 S.Ct. 287, 290, 79 L.Ed. 623, the court said:

“ ‘We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the commissioner’s determination, shown to be without rational foundation and excessive, will be enforced unless the taxpayer proves he owes nothing or, if liable at all, shows the correct amount * * *.’ ”

The case of *In re Schwann, U.S. v. Irving Trust Co.*, (CCA-2) 82 F. (2d) 160 involved the estate of a bankrupt. The referee made an order directing the United States to file proof of its claim within thirty days. After the thirty-day period, the claim was filed. The trustee moved to expunge the claim on the ground that it was filed too late and that the assessment was arbitrary and unwarranted. The Judge of the District Court held the bar order would be lifted, if the Government could show that their claim had merit, but since no merit was shown, the bar order stood. The Circuit Court of Appeals held that the bar order would stand on grounds not pertinent to the present action, but, commenting on the assessment, the Court held at page 161:

“When the government produced the assessment list, it had shown a prima facie right to have the bar order removed—a right which apparently was only controverted by oral assevera-

tions of the trustee's attorney. It may be that upon such a record, the referee ought to have removed the bar and to have tried out the claim on the merits and that Judge Coxe should have sent back the case to the referee for trial rather than for further consideration as to the removal of the bar. But no attempt was made to review the order of Judge Coxe under section 24b of the Bankruptcy Act, and the appellant produced as a witness the very man on whose investigation the assessment was made. His testimony showed that the assessment was a mere 'shot in the dark' having no foundation. In other words, the government's testimony overcame the presumption in its favor, and demonstrated that the assessment was arbitrary. *Helvering v. Taylor*, 293 U.S. 507, 515, 55 S.Ct. 287, 79 L.Ed. 623.

We suggest the above only to indicate that in our opinion the appellant lost nothing by its inability to remove the bar."

Louisville Provision Co. v. Glenn, District Court, W.D. Kentucky, 18 F. Supp. 423, involved a taxpayer who sought to enjoin an assessment of taxes. The Court held that it could not grant an injunction against the proposed assessment of taxes, but in pointing out the various remedies available to a taxpayer in cases of an illegal assessment of taxes, said at page 431:

"The taxpayer could then appeal to the Board of Tax Appeals, and a trial be had without the payment of any tax. The Commissioner of Internal Revenue would be required to find a fact basis for the determination of a deficiency, which,

if arbitrary and without support would be void. Helvering v. Taylor, 293 U.S. 507 * * *."

The importance of this statement of the Court cannot be underestimated. There must be a "fact basis" to a determination of a deficiency. A deficiency not based on facts but arrived at in a purely arbitrary manner is illegal and void.

In the case of *Simon Bloom*, 7 TCM 517, Dec. 16,529 (M), the court summarized the status of the law on the subject of arbitrary assessments by the Bureau of Internal Revenue. The taxpayer had reported gross income from the sale of narcotics. The taxpayer testified that he had lost the record on which said sales were listed. The Commissioner increased the gross income based on an estimate of daily sales. The Commissioner attempted to justify the assessment merely by the inadequacy of \$2310.00 to cover petitioner's known expenses and probable living requirements. \$2310.00 was the amount available to the petitioner based on his reported income. The Court, holding for the taxpayer, summarized the law on the subject of arbitrary assessment on page 518 as follows:

"If a taxpayer keeps no records or if those kept fail to reflect income correctly, a computation may be made in accordance with such methods as in the Commissioner's opinion does truly reflect income. Section 41, Internal Revenue Code; *Bishoff v. Commissioner* (C.C.A. 3rd Cir.) 27 Fed. (2d) 91 (1 U.S.T.C. par. 301). And in many such cases a computation based on a dis-

closed annual increase in wealth has received judicial approval as a measure for taxable receipts. *Hoefle v. Commissioner* (C.C.A. 6th Cir.) 114 Fed. (2d) 713 (40-2 U.S.T.C. Para. 9763); *O'Dwyer v. Commissioner* (C.C.A. 5th Cir.) 110 Fed. (2d) 925 (40-1 U.S.T.C. par. 9371); *Lewis Halle*, 7 T.C. 245 (Dec. 15,243). In some cases estimated living expenses have been approved as a proper addition to the increase in wealth so treated. *Kenny v. Commissioner* (C.C.A. 5th Cir.) 111 Fed. (2d) 374 (42-1 U.S.T.C. par. 9207); *Joseph Calafato*, 42 B.T.A. 881 (Dec. 11,-327) aff'd. (C.C.A. 3rd Cir.) 124 Fed. (2d) 187 (40-1 U.S.T.C. par. 9272). In all such cases, however, the determination approved was based on the Commissioner's ascertainment that the taxpayer held cash, bank accounts, securities or other property at the end of the year in excess of what he had held at the beginning. It was the taxpayer's failure to account for these increments in wealth which the courts stressed in sustaining this treatment of them as taxable income. As said in *Estate of Hague v. Commissioner* (C.C.A. 2nd Cir.) 132 Fed. (2d) 775 (43-1 U.S.T.C. par. 9258), cert. den. 318 U.S. 787: '* * * The determinations of the Commissioner were based on inferences properly drawn from the facts proved by the evidence, and were therefore entitled to be accepted as prima facie correct * * *.'

'The Commissioner's determination here, however, lacks the support of any ascertained facts or inferences indicating receipts in excess of the gross income reported * * *. The Commissioner, in the deficiency notice, by his evidence and on briefs, does not purport to have based his addi-

tion to income on any ascertained finding of receipts, and attempts to justify it merely by the inadequacy of \$2,310 to cover petitioner's known expenses and probable living requirements. We think that such a determination was arbitrary and should not be approved (Cf. *Helvering v. Taylor*, 293 U.S. 507 (35-1 U.S.T.C. par. 9044)). The record establishes that petitioner and his wife lived frugally. There are not even extravagant expenditures to support inferences of unexplained receipts. The determined addition of \$1,268 to income therefore is not sustained."

!

**V. APPELLEE HAS FAILED TO PROVE FRAUD BY CLEAR
AND CONVINCING OR ANY EVIDENCE.**

As heretofore pointed out, the appellee's evidence on appellant's alleged fraud was based entirely on the unfounded suspicions of the agent. The primary assessment itself, in appellant's opinion, was arbitrary and unwarranted. Under the law hereinafter cited, it is respectfully submitted that appellee wholly failed to establish facts warranting the fraud penalty.

Just as the law cloaks every man with a presumption of innocence, it likewise cloaks him with a presumption of good faith in his business dealings. Fraud is never presumed in a tax case. Fraud must be proved by clear and convincing evidence, and the burden of proof is on the Commissioner of Internal Revenue.

Duffin v. Lucas, (C.C.A. 6) 55 F. (2d) 786,
Budd v. Commissioner of Internal Revenue,
(C.C.A. 3) 43 F. (2d) 509,

Henry S. Kerbaugh, 29 B.T.A. 1014, affirmed
74 F. (2d) 749,

A. W. Mellon, 36 B.T.A. 977,

Jennison v. Commissioner of Internal Revenue,
(C.C.A. 5) 45 F. (2d) 4,

Griffiths v. Commissioner of Internal Revenue,
(C.C.A. 7) 50 F. (2d) 782,

Morris, par. 42,231 P-H Memo B.T.A.,

A. W. Minyard, par. 47,283 P-H Memo T.C.

M. W. Primm, par. 45,078 P-H Memo T.C.

In *Duffin v. Lucas*, *supra*, the court said on page
798:

“* * * In appropriate cases there is a presumption that the commissioner’s action was rightful; but it is a fundamental rule of judicial procedure that fraud cannot be lightly inferred but must be established by clear and convincing proof. It may well be that the right to due process would be infringed by a rule of procedure which abolished this fundamental principal and authorized a finding of fraud—at least, if involving a felony—to be based on that minimum called ‘any substantial evidence.’ Certainly, as we think, in a suit to recover back such a penalty, the general assumption that the commissioner was right has no evidential effect of itself sufficient to support a judgment affirming the penalty, its effect being procedural only; and the rule that a finding of fact by the judge in the District Court will be affirmed by us if there is any substantial evidence to support it, *does not avail* to sustain such finding of fraud if we conclude that the proof relied upon is insufficient in law to be rightfully regarded as clear, convincing or satisfying.”

In *Henry S. Kerbaugh, supra*, the court said at page 1015:

“* * * the burden of proving fraud in civil cases has always been held to be on him who asserts it. It is never presumed.”

In *Jennison v. Commissioner of Internal Revenue, supra*, the court said on p. 5:

“* * * However, the presumption does not extend to his determination that the taxpayer was guilty of fraud in filing his return. Fraud is never to be presumed but must be determined from clear and convincing evidence, considering all the facts and circumstances of the case.”

In *A. W. Minyard, supra*, the court said at p. 960:

“We are not unmindful here of Petitioner’s failure to prove the source of a large part of the income, particularly the \$18,000 alleged to have been received from Allen, or our finding, in part, for the respondent. That finding was based upon the presumption of correctness of the Commissioner’s determination and failure of proof by petitioner to overcome it. His failure in that regard does not relieve respondent of his full burden of proving that the deposits of money constituted income in 1944, the failure to report which was due to fraud with intent to evade tax. Considering petitioner’s habits of withholding from deposit to accounts in banks, amounts of currency commencing in 1918, mere proof of such deposits in 1944 does not meet the requirement of affirmative, clear and convincing proof of fraud by the respondent, or raise a presumption that the money was earned in 1944—and we have re-

frained from so holding, our conclusion as above stated being based on failure of proof."

In *M. W. Primm, supra*, the taxpayer was an official of the Works Progress Administration. The Government contended that the taxpayer owned a construction company and was taxable on the profits of that company. The taxpayer contended he had merely made loans to the company and did not own any interest in the company. The witnesses for the Government testified that the taxpayer as an official of the WPA could not legally or ethically have an interest in a construction company entering into contracts with the WPA. They further testified to the fact that the taxpayer desired to have an interest in a construction company, and a key witness for the Government testified that the taxpayer told him, prior to the formation of the business in question, that he (the taxpayer) intended to own such a business in the name of another person. However, the Government was unable to trace any of the income of the business into the possession of the taxpayer. Based on this evidence, the commissioner not only assessed the taxpayer on the income of the business but also asserted a fifty percent fraud penalty. The Court on p. 290 said, with regard to the testimony that the taxpayer *intended* to own the business in the name of some other person:

"* * * The witness did not profess to know whether the plans discussed were ever given effect, and we are not free to assume that they were in view of Primm's flat denial, the uncer-

tainty of the witness with respect to the time and circumstances surrounding the incidents about which he testified * * *."

The Court said on p. 289:

"* * * on the issue of fraud the burden rests on respondent to prove by clear and convincing evidence not only that petitioner had income which he did not report but that his failure to report it was with intent to evade tax. See *Duffin v. Lucas* (C.C.A. 6th Cir.) 55 Fed. 2d 786 (10 A.F.T.R. 1167, certiorari denied 287 U.S. 611, and *Griffiths v. Commissioner* (C.C.A. 7th Cir.), 50 Fed. 2d 782 (10 A.F.T.R. 106)."

The court said further on p. 289:

"The record is devoid of any evidence that during the years in question, Primm received and did not report taxable income from the construction equipment business * * *."

The cases above cited and discussed clearly establish that the appellee in the instant case has the burden of proving by clear and convincing evidence that the plaintiff filed a fraudulent return.

What is clear and convincing evidence?

Black's Law Dictionary, on page 337, defines clear and convincing proof as follows:

"There are numerous variations of the phrase 'clear and convincing' as applied to proof, such as 'clear and distinct,' 'clear, distinct and satisfactory,' 'clear, precise and indubitable,' 'clear and satisfactory,' 'clear, cogent and convincing,' etc. Generally, they mean, when applied to

proof, proof beyond a reasonable, i.e. a well-founded doubt, though, of course, the evidence may be conflicting and absolute certainty is not required (citing various cases). There are cases, however, that give a less rigorous but somewhat uncertain meaning, viz., more than a preponderance but less than is required in a criminal case (citing various cases)."

In the cases cited above on the necessity of clear and convincing evidence to support a fraud penalty, the Court did not in any of these cases define the term "clear and convincing." However, these cases do indicate that the burden placed upon the Commissioner when he alleges fraud is equivalent to the burden placed upon any party in a controversy who alleges fraud. In the case of *In re Locust Bldg. Co. Inc.* (C.C.A. 2), 299 Fed. 756, the Court said at p 765:

"The general rule is that fraud must be made out by a preponderance of evidence, which should be so clear and strong as to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit fraud or act in bad faith. 27 C. J. 62. And in Wigmore on Evidence, Vol. 4, par. 2498, alluding to the rule that in civil cases a preponderance of the evidence is sufficient, he states that a stricter standard is applied in cases of fraud. He says: 'But a stricter standard in some such phrase as "clear and convincing proof" is commonly applied to measure the necessary persuasion for a charge of fraud,' and in a few related classes of cases.

"As was said in *Jones v. Simpson*, 116 U.S. 609, 615, 6 Sup. Ct. 538, 29 L.Ed. 742, the law pre-

sumes, in the absence of evidence to the contrary, that the business transactions of everyone are carried on in good faith, and anyone who alleges that such acts are done in bad faith, or for a dishonest or fraudulent, purpose, takes upon himself the business of showing the same * * *."

The Court said further on page 766:

"In *Farrar v. Churchill*, 135 U.S. 609, 615, 10 Sup. Ct. 771-773 (34 L.Ed. 246), the Court said: 'Fraud is never presumed, and where it is alleged, the facts sustaining it must be clearly made out.'

"In *Lalone v. United States*, 164 U.S. 255-257, 17 Sup. Ct. 74, 75 (41 L.Ed. 425), the Court, referring to proceedings to set aside deeds or other written instruments on the ground of fraud practiced by defendant upon a plaintiff, said that: 'The rule is of long standing and is of universal application, that the evidence tending to prove the fraud * * * must be clear and satisfactory. It may be circumstantial, but it must be persuasive. A mere preponderance of evidence, which at the same time is vague or ambiguous, is not sufficient to warrant a finding of fraud and will not sustain a judgment based on such finding.' "

In *Tucker v. Moreland*, 35 U.S. 58, the Supreme Court of the United States said at page 78:

"Fraud is never presumed, either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation."

The appellee's evidence in the instant case falls far short of meeting the requirements of the well established rule that clear and convincing evidence is required to establish fraud.

CONCLUSION.

Because, as is set forth in this brief, and from the records and evidence in this case, the primary assessment herein referred to was arbitrary and excessive; because the acceptance by the agent of appellant's estimate that 86% was the correct percentage of his distilled spirits sales against gross sales without checking said estimate or auditing appellant's books; because, from appellant's permanent books and records all information could be gleaned necessary to determine the correctness of appellant's April 1st, 1944 physical inventory; because the actual audit by the State Board of Equalization determined that 96.41% was the actual percentage of distilled spirit sales against gross sales; because appellee, without checking said State Board of Equalization audit, ignored it completely; because appellee alleged in his answer that his own May 2, 1944 physical inventory was erroneous because of omissions and errors in appellant's records, and failed to prove such errors and omissions, but instead contended on the trial that its May 2, 1944 physical inventory was erroneous because of an alleged concealment of distilled spirits by appellant; because such alleged concealment was not proved but was based entirely upon irrevelant and unsupported

suspicious; because appellee failed to prove the concealment of any whiskey by appellant; because various Findings of Fact as herein set forth are unsupported by the evidence and contrary to the evidence; because, by stipulation, appellee has, in effect, admitted his primary assessment is in error; because appellee admitted, though such admission is unwarranted, that he can not at this time nor could he prior to the trial, determine appellant's true and correct inventory as of April 1st, 1944; and finally, because appellee has utterly failed to sustain his burden of proving fraud by clear and convincing evidence, it is respectfully submitted that the judgment herein entered must be reversed.

Dated, San Francisco, California,
August 28, 1950.

Respectfully submitted,

MORRIS M. GRUPP,

LEON SCHILLER,

Attorneys for Appellant.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

SCHEDULE I.

COMPUTATION OF DISTILLED SPIRIT SALES BY STATE BOARD OF EQUALIZATION

<i>Per Plaintiff's Exhibit 21, Page 1</i>	
Beginning Inventory—6/30/43	\$ 5,912.24
Purchases	174,772.73
	<hr/>
	\$180,684.97
Less Inventory—5/25/44	18,827.22
	<hr/>
	\$161,857.75
Floor Tax Paid	3,991.09
	<hr/>
	\$165,848.84
Gross Profit	55,282.86
	<hr/>
Distilled Spirit Sales (Exclusive of Sales tax)	\$221,131.70
Sales Tax	5,528.29
	<hr/>
Distilled Spirit Sales (Including sales tax)	\$226,659.99
	<hr/>

The purchase figure of \$174,772.73 is supported by the appellant's records as follows:

Plaintiff's Exhibit 14

Caption—"Invoice Register"

Column—"Distilled Spirits"

Month	Page	Amount
July, 1943	36-A	\$ 6,378.51
August	38	7,730.91
September	40-A	9,778.22
October	42-A	7,733.71
November	44-A	16,222.39
December	46-A	71,533.45
January, 1944	47-A	18,499.63
February	48-A	24,780.70
March	49	4,926.34
April	50	21,927.69
May	51	2,698.19
May	51	89.32
Total		<hr/> \$192,299.06

Total (Determined by State Board—which total
is \$119.81 less than above) \$192,179.25

Less:

Freight charges classified as purchases

S.F. Warehouse (March, 1944—Page 49)	\$ 54.25	
Transport Clearings (March, 1944—Page 49)	115.18	
S.F. Warehouse (March, 1944—Page 49)	108.25	
Manhattan Mountain Lines (April, 1944—Page 50)	57.68	
S.F. Warehouse (May, 1944—Page 51)	21.00	356.36
		<hr/>
		\$191,822.89

Less:

Merchandise transferred from the Geary Street
Store to the Fillmore and Haight Street Stores
Plaintiff's Exhibit 14
Caption—"Journal"
Third page counting back from the caption
"Assets"

Transferred to Haight Street Store	\$ 4,735.40 A	
Transferred to Fillmore Street Store	15,658.40 A	
		<hr/>
		20,393.80
		<hr/>
		\$171,429.09

Note (A)—Exhibits 12 and 13 (plaintiff) are transfer sheets setting forth the specific merchandise transferred from the Geary Street store to the Fillmore and Haight Street stores.

Add:

Merchandise transferred to the Geary Street
Store From the Mission Bar

Plaintiff's Exhibit 14

Caption—"Journal"

Third page counting back from the caption
"Assets"

The Journal entry shows that \$1020.34 merchandise was transferred from the Mission Bar to the Geary Street store. Apparently \$49.32 of this merchandise was not distilled spirits because Plaintiff's Exhibit 21 shows that distilled spirits transferred were in the amount of

971.02

\$172,400.11

Add:

Credit memorandum not applicable to distilled spirit purchases between July 1, 1943 and May 25, 1944, but entered as a credit in December, 1943

Plaintiff's Exhibit 14

Caption—"Invoice Register"

Column—"Distilled Spirits"

December, 1943—Page 46 (A)

2,372.62

Purchases of Distilled Spirits—Per State Board
Audit

\$174,772.73

After adding the opening inventory of \$5,912.24 to the purchases of \$174,772.73, the State Board subtracted the distilled spirits inventory at May 25, 1944 in the amount of \$18,827.22. Exhibit 11 (plaintiff's) is the typed recapitulation of the appellants' inventory of the Geary Street store on May 25, 1944. On Page 1 of said Exhibit the following items appear:

Whiskey, Gin, Rum, Scotch, Brandy

\$ 14,973.19

Liqueur

3,854.03

\$ 18,827.22

These two items are the only distilled spirits in this inventory.

The next item the State Board considered was the floor tax paid. Paragraph VIII of the complaint (Transcript, p. 6) alleged that the appellant reported an inventory of distilled spirits for the Geary Street store in the amount of 1,330.36 proof gallons. Paragraph VIII of the answer (Transcript, p. 21) admits the truth of the allegation. The rate of floor tax was \$3.00 per proof gallon and \$3.00 multiplied by 1,330.36 equals \$3,991.09.

The State Board then added $33\frac{1}{3}\%$ mark-up, the mark-up accepted by all parties to this controversy as the correct mark-up.

The next figure is \$5,528.29 California sales tax which represents $2\frac{1}{2}\%$ of \$221,131.70.

Appendix B

SCHEDULE II

EXCERPTS FROM PLAINTIFF'S EXHIBIT 7 IN EVIDENCE

“Records of sales to you by dealers from whom you purchased distilled spirits and other records examined during investigation show that the total distilled spirits which should have been declared by you amounted to 3414.25 proof gallons which resulted in a net underdeclaration of distilled spirits tax of \$5,-065.92. This underdeclaration of tax amounted to approximately 50% of the entire amount of tax which should have been declared and cannot be justified as due to error, oversight, or circumstances beyond your control. Therefore, penalty of 50% of the amount of the tax was recommended for assessment, and assessment was made of this penalty as provided for in Section 3612(d)(2) Internal Revenue Code.

“It is presumed that upon receipt of the notice of assessment of tax on Form 17-B that you have re-examined the copy of the inventory retained at your premises. Such examination and examination, also, of your records of purchases and sales of distilled spirits, whether stored on your premises or held by you in storage elsewhere, should reveal correctness of the amount of tax due.”

No. 12,530

IN THE
United States Court of Appeals
For the Ninth Circuit

NICK W. MAROOSIS,

Appellant,

VS.

JAMES G. SMYTH, United States Col-
lector of Internal Revenue,

Appellee.

On appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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United States Attorney.

FILED

OCT - 5 1950

Subject Index

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	5
Summary of argument	8
Argument:	
I. The findings of the District Court are sustained by the pleadings and the evidence	8
II. The assessment is neither arbitrary nor excessive.....	14
III. There is sufficient evidence in the record to sustain the fraud penalty	21
Conclusion	24

Table of Authorities Cited

Cases	Pages
Bergdoll v. Pollock, 95 U. S. 337	16
Harris v. Commissioner, decided November 12, 1948.....	19
Helvering v. Taylor, 293 U. S. 507.....	18, 19
Mangone, Philip, Co. v. United States, 54 F. (2d) 168.....	16
McDonald v. Commissioner, decided November 11, 1944....	19
National Weeklies v. Commissioner, 137 F. (2d) 39.....	20
Stratman v. Commissioner, decided June 7, 1949.....	20
United States v. Anderson, 269 U. S. 422.....	16
United States v. Fidelity & Casualty Co., 115 F. (2d) 475..	16
United States v. Mitchell, 271 U. S. 9	16
United States v. Rindskopf, 105 U. S. 418	18
United States v. United States Fidelity & Guaranty Co., 144 Fed. 866	18
United States Fidelity & G. Co. v. United States, 201 Fed. 91	19
United States Fidelity & Guaranty Co. v. United States, 220 Fed. 592	18
Ward v. Commissioner, decided July 14, 1948.....	20

Statutes

Internal Revenue Code:

Sec. 2800 (26 U.S.C. 1946 ed., Sec. 2800)	3, 4
Sec. 3612 (26 U.S.C. 1948 ed., Sec. 3612)	4, 21

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BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the Court below (R. 295-306) has
not been reported.

JURISDICTION.

This appeal involves federal floor stocks taxes on dis-
tilled spirits imposed by Section 2800 (k) of the In-
ternal Revenue Code as added by Section 308 (a) (k)
of the Revenue Act of 1943. The appellant on or
about May 1, 1944, filed an inventory as of April 1,

1944 and on July 1, 1944, paid the floor stocks taxes as reported to be due thereon. (R. 3.) The Commissioner of Internal Revenue determined the return to be false and fraudulent and made an assessment for additional floor stocks taxes due on 1,222.85 proof gallons of distilled spirits in the sum of \$3,668.55 and an *ad valorem* penalty of 50% on \$9,467.81, the total amount of floor stocks taxes incurred on April 1, 1944, in the sum of \$4,733.91, and also \$76.19 in adjustments, making a total assessment of \$8,478.65. (R. 6.) This sum together with interest making the total sum of \$9,876.39 was paid to the Collector in installments from June 15, 1946, to February 2, 1948. (R. 4.) Taxpayer filed a claim for refund which was denied by the Commissioner of Internal Revenue on February 15, 1949. (R. 7-8.) The taxpayer filed his complaint on June 22, 1949. (R. 2-19.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The case was tried and judgment was entered for the Government on February 27, 1950. (R. 57-58.) Within sixty days and on March 24, 1950, notice of appeal was filed (R. 60), pursuant to the provisions of 28 U.S.C., Section 1291.

QUESTIONS PRESENTED.

1. Whether the findings of fact and conclusions of law are supported by the pleadings and the evidence.
2. Whether the assessment is arbitrary and capricious and therefore illegal and void.

3. Whether the evidence is sufficient in law to support the 50% fraud penalty.

STATUTES INVOLVED.

Internal Revenue Code:

Sec. 2800. TAX.

* * * * *

(k) [added by Section 308 (a), Revenue Act of 1943, c. 63, 58 Stat. 21]¹ 1944 FLOOR STOCKS TAX.—

(1) *Tax*.—Upon all distilled spirits upon which the internal-revenue tax imposed by law has been paid, and which on the effective date of Title III of the Revenue Act of 1943, are held and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected, and paid a floor stocks tax of \$3 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof-gallon.

(2) *Returns*.—Under such regulations as the Commissioner with the approval of the Secretary shall prescribe, every person required by paragraph (1) to pay any floor stocks tax shall, on or before the end of the thirtieth day following the effective date of Title III of the Revenue Act of 1943 make a return and shall, on or before the first day of the third month following such effective date, pay such tax. Payment of the tax

¹The Act went into effect February 25, 1944, and the floor stocks tax attached on April 1, 1944, as provided by Section 301.

shown to be due may be extended to a date not later than the first day of the tenth month following the effective date of Title III of the Revenue Act of 1943, upon the filing of a bond for payment thereof in such form and amount and with such surety or sureties as the Commissioner, with the approval of the Secretary, may prescribe.

(3) *Laws Applicable*.—All provisions of law, including penalties, applicable in respect of internal-revenue taxes on distilled spirits shall, insofar as applicable and not inconsistent with this subsection, be applicable in respect of the floor stocks tax imposed hereunder. For the purposes of this subsection the term “distilled spirits” shall include products produced in such manner that the person producing them is a rectifier within the meaning of section 3254 (g).

(26 U.S.C. 1946 ed., Sec. 2800.)

Sec. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

* * * * *

(d) ADDITIONS TO TAX.—

* * * * *

(2) *Fraud*.—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3612.)

STATEMENT.

This is an action brought by the taxpayer, a resident of San Francisco, California, against James G. Smyth, the Collector of Internal Revenue for the First Collection District of the State of California. (R. 50.)

Pursuant to Section 308 of the Revenue Act of 1943, the taxpayer filed a floor stocks tax return in which he reported 1,330.36 proof gallons of distilled spirits on hand on April 1, 1944, at the 458 Geary Street store and paid the floor stocks tax of \$3.00 per gallon thereon. Thereafter, the Commissioner of Internal Revenue assessed additional floor stocks taxes upon an alleged under-declaration of the inventory of distilled spirits at the 458 Geary Street store in the sum of \$3,744.74 and a fraud penalty of \$4,733.91. The additional assessment was in the sum of \$8,478.65, plus interest of \$1,397.74 for a total of \$9,876.39 which was paid to the Collector of Internal Revenue, in installments from June 15, 1946, to February 2, 1948. (R. 3-4, 20.) The taxpayer filed a claim for refund of \$9,876.39 (R. 10-19) on the ground that the inventory of distilled spirits on hand April 1, 1944, as shown in the floor stocks tax return was true and correct and was supported by an audit report of W. E. Holcomb, Auditor of the California State Board of Equalization covering the period from July 1, 1943 to June 30, 1944. (R. 15.) The refund claim was denied on February 15, 1949 (R. 8), and the complaint was filed November 26, 1949. (R. 25.)

On March 31, 1944, 200 cases of Three Rivers whiskey floor stock of the store at 458 Geary Street were moved by taxpayer from a warehouse to an unknown destination. (R. 51.)

On May 2, 1944, the collector, by his agents, took a physical inventory of the stock of the store at 458 Geary Street and after determining the sales and purchases of the store for the month of April, 1944, adjusted the inventory back to April 1, 1944. The inventory as adjusted did not include, nor did it account for the 200 cases of Three Rivers whiskey moved from the warehouse on March 31, 1944. The inventory did not include, nor did it account for 100 cases of Three Rivers whiskey later claimed by taxpayer to have been located in the basement of a store at 499 Haight Street, San Francisco, California. (R. 51.)

The comparison of the inventory of May 2, 1944, as adjusted to April 1, with taxpayer's tax return of May 1, 1944, showed a difference in over-declaration of distilled spirits by taxpayer of 108.98 proof gallons. (R. 51.)

Neither the inventory taken by the Collector on May 2, 1944, as adjusted to April 1, 1944, nor the inventory taken by taxpayer on April 1, 1944, upon which his tax return of 1330.36 proof gallons was predicated, was true or correct. Taxpayer's tax return of May 1, 1944, was false and incorrect. Subsequent to May 2, 1944, the Collector determined taxpayer's purchases and gross sales of distilled spirits

for the period from November 1, 1942, to March 31, 1944, and was informed by taxpayer that the percentage of sales of distilled spirits as to other sales for that period was 86%. Use by the Collector of the percentage figure of 86% under the circumstances was reasonable and was more favorable to taxpayer than would have been the use of 66% which was the percentage originally suggested by taxpayer as correct. The Collector converted the money figure for purchases and gross sales of distilled spirits during that period into proof gallons and determined that taxpayer had failed to declare 1,222.85 proof gallons of distilled spirits in his tax return of May 1, 1944. Such method was the most reasonable and rational one available to the Collector under the circumstances, especially since because of the knowledge the Collector's agents had of the diversion of the 200 cases of whiskey mentioned above the Collector could have no confidence in any report by the taxpayer. The Commissioner of Internal Revenue thereafter levied an assessment on the taxpayer. (R. 51-52.)

Taxpayer knowingly, intentionally, wilfully and deliberately concealed and failed to declare in his floor tax return filed May 1, 1944, the 200 cases of whiskey removed from the warehouse on March 31, 1944. (R. 53.)

SUMMARY OF ARGUMENT.

There is ample evidence in the record to sustain the findings of fact made by the Court below that taxpayer's floor stocks tax return was incorrect, and that Three Rivers whiskey was removed from a warehouse to places other than the liquor store at 458 Geary Street, San Francisco, California. That same evidence supports the finding that taxpayer knowingly, intentionally, wilfully, and deliberately concealed and failed to declare 200 cases of whiskey removed from the warehouse on March 31, 1944. It then follows from those findings that taxpayer is liable for the fraud penalty. The amount of the assessment is the result of a calculation based upon estimated sales of distilled spirits equal to 86% of total sales, a figure given the agent by the taxpayer, and upon the failure of taxpayer's books to show the sale of the large quantity of whiskey withdrawn from the warehouse. This is the most rational basis under all the circumstances as found by the Court below. There is no evidence in the record to prove that the assessment was arbitrary or incorrect and no basis for entry of a judgment in favor of the taxpayer.

ARGUMENT.

I.

**THE FINDINGS OF THE DISTRICT COURT ARE SUSTAINED
BY THE PLEADINGS AND THE EVIDENCE.**

The evidence before the District Court clearly sustains the findings of fact made by the Court, and

the judgment should be affirmed. There is ample evidence to sustain Finding of Fact III (R. 51), that 200 cases of Three Rivers whiskey was moved from a warehouse on March 31, 1944, to an unknown destination. Witness Hedrick testified that taxpayer, on February 21, 1944, stored 775 cases of Three Rivers whiskey in the San Francisco warehouse of which 375 cases had been removed up to March 30, 1944. (R. 246.) The removals are listed in Exhibit A.² On March 31, 1944, he and inspector Arisco observed a truck at 458 Geary Street; they kept this truck under observation and at 12:15 P.M., it went to the San Francisco warehouse where taxpayer had his whiskey stored. A coupe known to the witness to be associated with taxpayer's store drove up at the warehouse while the truck was there and the driver of the coupe and the driver of the truck had a conversation. At 2:15 P.M., the warehouseman brought cases resembling whiskey cases to the platform and loaded them into the truck. At 3:00 P.M., the truck left the warehouse and the witness followed it to the Standard Garage on Drumm Street, where he saw the cases transferred from the truck to a black panel-bodied Dodge truck which was in the rear of the garage. The witness then followed the Dodge truck to a residence at 1348 and 1350 San Bruno Avenue, where it was driven into the basement garage of the residence. (R. 246-248.) The witness returned to the Standard Garage at about 5:00 P.M. At 7:15 the

²Exhibit A is not printed in the record but is partially described. (R. 213-214.)

truck drove to Joseph's liquor store and several cartons of whiskey were taken from it and loaded into automobiles parked at the curb. At 8:15 P.M., the truck was driven to 2066 Fillmore where four hand-truck loads of cartons resembling liquor cartons were loaded from the store into the truck which drove off at about 8:40 P.M., but due to traffic the witness could no longer follow. (R. 248-249.)

Exhibit A³ shows the withdrawals of whiskey from the warehouse. On March 30, 1944, 200 cases were withdrawn and on March 31, 200 cases were withdrawn. But the sales records of taxpayer did not account for the disposition of this much whiskey. Total sales on March 30 and 31 were only \$2,433.06 and \$2,663.90, respectively. (R. 219-221.) And accordingly to taxpayer's own testimony, he sold Three Rivers whiskey at \$40 per case and in larger quantities at \$33 per case. (R. 221-222.) If the taxpayer had sold the 400 cases of whiskey on the last two days before the floor stocks tax attached his receipts for Three Rivers whiskey alone would have been not less than \$6,600 and perhaps nearer \$8,000 on each of those days.

Taxpayer testified that his records did not include large cash sales. (R. 137.) But when he was asked, on cross-examination, to account for the sale of 200 cases he pointed to a figure 80 and identified that as the price received for two cases of Three Rivers

³Exhibit A is not printed in the record but is partially described. (R. 213-214.)

whiskey on March 31, 1944 (R. 220-221), and when asked how much of the 500 cases of Three Rivers whiskey was on hand March 30 and March 31, he testified that there was no way of telling. (R. 222.) This evidence supports the District Court's Finding of Fact IV that the 200 cases of Three Rivers whiskey withdrawn March 31, 1944 was not included in taxpayer's inventory of April 1, 1944.

Prior to March 30, 1944, taxpayer had withdrawn from the warehouse 375 cases and had on hand April 1, 1944, 180 cases of Three Rivers whiskey (R. 240) and according to his own testimony he had on hand 171½ cases besides the 100 cases which he contends were at 499 Haight Street. (R. 222-223.) It is a reasonable assumption under the evidence that the Three Rivers whiskey reported in taxpayer's tax return was that remaining from withdrawals made from the warehouse before March 30, 1944. Taxpayer testified that he thought the 100 cases were placed in the Haight Street Store on March 29 (R. 224), but when witness Hedrick made the spot check on May 2, 1944, and 60 cases were supposed to be stored there, Hedrick saw no whiskey stored in the basement, it was empty but for rubbish and he was advised that the basement was never used. (R. 239.) Taxpayer's inventory had an over-declaration of 108.97 proof gallons as compared with the inventory of the Collector made May 2, 1944, as of April 1, 1944. Mr. Bruch tried to explain that by saying there were 60 cases of Three Rivers whiskey still at the Haight Street store. However, taxpayer claimed to

have 100 cases which contained 206 proof gallons and the amount of the so-called over-declaration is only about one-half of 100 cases. There is substantial evidence to support the District Court's Findings of Fact III and IV.

The taxpayer offered no evidence to refute the evidence offered on behalf of the Collector but after trial he made a motion to reopen the case, based upon the affidavit of David Dellari. (R. 23-26.) The affidavit merely states that affiant is the owner of the premises at 1348-1350 San Bruno Avenue, San Francisco, California, which he had rented to Tommy Briggs and Frank O'Connor, and on or about April 1, 1944, three agents of the Alcohol Tax Unit came to him for permission to examine the garage for whiskey. He took them to the garage but they found no whiskey. This affidavit in no way refutes the Collector's testimony but proves that the agents made a further effort to locate the whiskey which had been transported in the Dodge truck on March 31, 1944. The lower Court rightly stated that taxpayer should have offered evidence to refute the Collector's evidence. Several people knew of the transfer, from the warehouse, the man who drove the coupe, the man at the warehouse, two men in the truck and the man at the Standard Garage. (R. 246-247.) As a matter of fact, whoever it was who withdrew the whiskey from the warehouse was the agent of taxpayer and he failed to produce the only person or persons who could testify to which place or places the whiskey had been transferred.

The evidence as above set forth proves also, since taxpayer's records failed to show the sale of the Three Rivers whiskey, that it should have been included in his inventory which it was not. The Court's finding, therefore, that his inventory was incorrect is supported by substantial evidence and must stand and the same applies to the inventory taken by the Collector on May 2, 1944, and adjusted back to April 1, 1944.

The fact that the taxpayer withdrew 400 cases from the warehouse on March 30 and March 31, which, according to his records, were not sold on those days, and the testimony of the Collector as to what transpired on March 31, 1944, is a sound basis for the Court's Finding of Fact VII that taxpayer knowingly, intentionally, wilfully and deliberately concealed and failed to declare in his tax return filed May 1, 1944, the 200 cases of whiskey removed from the warehouse on March 31, 1944, and the 100 cases claimed to have been at the Haight Street store.

Finding of Fact VII is sufficient to sustain the Conclusion of Law IV, that the return was false and fraudulent and that taxpayer deliberately suppressed vital facts with the intent to evade taxes which justified the assessment of the fraud penalty.

The taxpayer contends that the evidence offered by the Collector is irrelevant and shows only suspicion. (Br. 28-36.) The chief issue in the case is whether the taxpayer's tax return was correct. Under this issue it was material for the Collector to produce

evidence to show that the return was false; and any evidence having a bearing on that issue was material. Surely it will not be said that the withdrawal of 400 cases of whiskey from the warehouse on March 30 and 31, 1944, and the fact that taxpayer's records for those days failed to show sales of such quantities was immaterial. This evidence goes to the very heart of the case. The District Court's findings are sustained by substantial material evidence.

II.

THE ASSESSMENT IS NEITHER ARBITRARY NOR EXCESSIVE.

The assessment is supported by substantial evidence and is therefore neither arbitrary, excessive nor void. Revenue Agent Hedrick checked the records of wholesale liquor dealers to determine the quantity of distilled spirits purchased for the 458 Geary Street store from November 1, 1942, to March 31, 1944, and found that the purchases amounted to 12,944.74 proof gallons. (R. 13.) From that information Hedrick found the average price paid for distilled spirits during that period to be \$15.965 per proof gallon. (R. 274.) Upon this computation the cost to taxpayer came within \$41 of the amount paid for distilled spirits during this period as shown by taxpayer's ledger. (R. 251-252.) The agent then computed the selling price at cost to taxpayer plus one-third and arrived at the average selling price of \$20.93 per proof gallon. (R. 252.) The gross sales from November 1,

1942, to March 31, 1944, amounted to \$269,287.26 as stipulated. (R. 27.) The proof gallons of distilled spirits sold during the period was determined by taking 86% (taxpayer's estimate) of that figure and dividing it by \$20.93, and amounted to 11,023.46 proof gallons. By subtracting the amount from the amount on hand November 1, 1942, plus the amount purchased during the period, the agent determined that taxpayer had 2,553.21 proof gallons on hand April 1, 1944. This showed an under-declaration of 1,222.85 proof gallons in taxpayer's inventory. (R. 13.)

Taxpayer has failed to attack the correctness of the formula used except to say that instead of using 86% the agent should have used 96% because that is the percent used by the State Auditor to determine the quantity of distilled spirits in proportion to the gross sales. The period of time involved in the State Auditor's calculation was from July 1, 1943, to June 30, 1944; only three quarters of which cover a portion of the period prior to the taxpayer's floor stocks tax return. (R. 18.) Furthermore, the quantities of distilled spirits sold each month increased and therefore the percentage of distilled spirits sold in relation to total sales from July 1, 1943, to June 1, 1944, would have been greater than during the period from November 1, 1942, to March 31, 1944. Accountant Bruch testified that the 96.41 percentage figure was based upon a figure which included sales tax. (R. 193.) Furthermore, the figure used was \$91,767.40, total sales for the first three months of 1944. (R. 193.) The sales from January 1 to March 31, 1944, amounted

to \$36,510.93 as shown by the daily sales records which had been kept by taxpayer's employee, Mrs. Woodward. (R. 159-161.) Taxpayer's books did not show this difference (R. 187-189), and Bruch testified that without the daily record the sales of distilled spirits could not be determined. (R. 191.) The evidence offered by the taxpayer fails to establish that the assessment is wrong, or wherein it is wrong.

The best evidence to sustain taxpayer's floor stocks tax return was his books. *Bergdoll v. Pollock*, 95 U.S. 337; *United States v. Fidelity & Casualty Co.*, 115 F. (2d) 475 (C.A. 3d). He produced his books covering the period from November 1, 1942 to March 31, 1944, except those for the year 1943, which were missing except for November and probably October. They were available when the Collector made his audit. (R. 131, and Ex. 18.) Taxpayer did not explain why he could not produce the missing records but attempted to get the Court below to accept the percentage figure of the State Auditor.

In a suit for refund the burden of proof is upon the taxpayer to establish the invalidity of the tax. *United States v. Anderson*, 269 U.S. 422; *United States v. Mitchell*, 271 U.S. 9. Where from the record the Court is unable to find what portion of the alleged overpayment for which the suit has been brought was not owing, it is impossible for the Court to determine the amount of the judgment and the taxpayer's suit must be dismissed. *Philip Mangone Co. v. United States*, 54 F. (2d) 168 (C. Cls.).

Taxpayer contends that the assessment was arbitrary and excessive, but he admits that he told the agents that his distilled spirits sales amounted to 86% of his business. (R. 145-146.) Thus the determination of the Commissioner was made upon the taxpayer's own estimate. Wherein then is it arbitrary? Furthermore if we take the 400 cases of whiskey withdrawn from the warehouse on March 30 and March 31, 1944, and conclude that taxpayer's sales records do not show their disposition together with the 100 cases claimed to have been stored at the Haight Street address, we have 400 or 500 cases of Three Rivers whiskey on hand which were not taken up in the April 1 inventory and included in the tax return filed May 1, 1944. The Court held the 100 cases at the Haight Street store were omitted from the inventory because he had no confidence in taxpayer's testimony. (R. 302.) The Three Rivers whiskey was stored in the warehouse. If there was not room for storage in the store for more whiskey why should it be withdrawn? Taxpayer's evidence cannot be believed.

The taxpayer has failed to produce any evidence to show the extent to which the Commissioner's assessment is wrong and therefore the judgment must be affirmed. Taxpayer maintains that the concealment of 200 cases containing 412.8 proof gallons does not sustain an assessment on 1,222.85 proof gallons. (Br. 36-39.) The assessment is not based upon the concealment of 200 gallons only. The taxpayer's records were incomplete and it was impossible to determine from the sales records the amount of dis-

tilled spirits sold from November 1, 1942, to March 31, 1944, so the Commissioner took taxpayer's estimate of 86% of all sales in dollars and converted it into proof gallons thus leaving 1,222.85 proof gallons which were omitted from the inventory. An assessment based upon an estimate is lawful. *United States v. United States Fidelity & Guaranty Co.*, 144 Fed. 866 (Conn.); *United States Fidelity & Guaranty Co. v. United States*, 220 Fed. 692 (C.A. 4th).

Helvering v. Taylor, 293 U.S. 507, originated in the Tax Court and involved the redetermination of the tax. The Supreme Court said (p. 511):

Before the Board of Tax Appeals the taxpayer introduced evidence to show the details of the transaction and that there was no change in value of the utilities stock between the time he got it in August, 1927, and the date, October 13 of the same year, on which he transferred it to the holding company in exchange for its shares and that the entire increase in value came after that transfer. No opposing evidence was offered.

Furthermore, where the Tax Court has before it the redetermination of the tax there is no presumption of the correctness of the Commissioner's determination. In a suit for refund, however, the assessment having been made and paid it is presumed that the assessment is correct and the burden is on the taxpayer not only to prove that the assessment was wrong but also wherein and to what extent it is incorrect. *United States v. Rindskopf*, 105 U.S. 418; *United States Fidelity & G. Co. v. United States*, 201

Fed. 21 (C.A. 2d). The *Taylor* case, *supra*, is thus distinguishable from the instant case.

In *McDonald v. Commissioner*, decided November 11, 1944 (1944 P-H T. C. Memorandum Decisions, par. 44,363), we need but look to the language of the Court which taxpayer quotes in his brief. (Br. 46.) The daily slips made out for the year 1941 were placed in evidence by the taxpayer and he testified that they truthfully reflected his gains. The Commissioner determined that he must have had a 10% profit and the Court said such an assumption *without evidence* could not be accepted in the face of taxpayer's testimony supported by his records.

In *Harris v. Commissioner*, decided November 12, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,235), the Tax Court, with reference to the Commissioner's computation said:

"We are not fully informed as to how he arrived at most of these figures, but we do have the testimony of the man who compiled them that, as a starting point, relying on an unwarranted interpretation of a conversation with petitioner, he multiplied the bank deposits by two, apportioned the income to the dental practice and the hotel and deducted as estimated expenses the figures shown, thus arriving at the net income shown."

In the instant case we have no unwarranted interpretation by the agent. We have taxpayer's corroboration that he told the agents his sales of distilled spirits were 86% of the total sales and the only reason

he now believes the sales to have been greater is because of the audit made by the State of California, which covers a different period. (R. 145-146.)

In *Ward v. Commissioner*, decided July 14, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,133), the Court said that where the basis of the assessment is plainly not consistent with the surrounding circumstances the determination is without rational foundation and is excessive. And in *Stratman v. Commissioner*, decided June 7, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,143), the Court said the Commissioner's mark-up was not even in the general neighborhood of that employed by the Revenue Agent. The decisions in these cases are not applicable to the facts and circumstances in the instant case.

In the instant case there is an abundance of competent and relevant evidence to sustain the assessment. In *National Weeklies v. Commissioner*, 137 F. (2d) 39, 41 (C.A. 8th), the Court said:

When a taxpayer challenges the factual warrant for a deficiency assessment by the Commissioner, he must produce evidence before the Board of Tax Appeals which reasonably demonstrates that the Commissioner was wrong. *Burnet v. Houston*, 283 U.S. 223, 51 S. Ct. 413, 75 L. Ed. 991; *Lumaghi Coal Co. v. Helvering*, 8 Cir., 124 F. 2d 645; *Clements v. Commissioner*, 8 Cir., 88 F. 2d 791. If the taxpayer's evidence is so equivocal and indefinite as not to afford a satisfactory legal basis for determining the facts, the Board may properly declare that he has failed to sustain the burden of demonstrating that the Com-

missioner was wrong and may uphold the deficiency determination accordingly. *Mahler v. Commissioner*, 2 Cir., 119 F. 2d 869.

The conclusion that the Commissioner's determination, that taxpayer failed to declare 1,222.85 proof gallons of distilled spirits in his floor stocks tax return was reasonable, must be sustained.

III.

THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUSTAIN THE FRAUD PENALTY.

There is ample evidence in the record to sustain the Court's Finding VII that 200 cases of whiskey were deliberately and wilfully concealed and not declared in the floor stocks tax return. Section 3612 (2) (d), Internal Revenue Code, *supra*, provides that 50% of the amount of the return shall be added in case a false or fraudulent return or list is wilfully made. The amount of the penalty is not in question because it is based upon amount of the correct return. The only objection taxpayer makes is that there is no substantial evidence to sustain it.

The Collector accepts the burden to prove that taxpayer wilfully made a false return. We need not, therefore, review the cases cited by the taxpayer on this point. Instead we must review the evidence. The testimony of Agent Hedrick with reference to the removal of the 200 cases of whiskey on March 31, 1944,

shows positive acts of removal and concealment. They were removed from the warehouse, taken to a garage where some cases were transferred to a black panel Dodge car and taken to the premises on San Bruno Avenue. Other cases were loaded in another automobile on the street near the Geary Street store. Taxpayer's records failed to account for the disposition of such quantities before April 1, 1944, when the inventory was taken. This evidence shows a wilful removal and concealment.

Why should taxpayer withdraw whiskey from the warehouse if there was no room in his liquor store to keep it? There is only one answer and the lower Court gave that answer: So that those distilled spirits need not be declared in his floor stocks tax return! So that taxpayer could avoid payment of the floor stocks tax! There was no other logical or rational reason and taxpayer made absolutely no effort to explain these removals. If the 200 cases had been sold, under the circumstances and conditions described by Agent Hedrick the taxpayer would have remembered it. The sale of 200 cases to one or two persons on the last day before taking the inventory was not an ordinary transaction and yet taxpayer did not give one word of explanation. The only rational conclusion to be drawn from these circumstances is that the taxpayer was concealing some whiskey to avoid payment of tax.

Taxpayer contends that the Court's finding with reference to the removal of the 200 cases of whiskey

is immaterial and there is on evidence that it was whiskey. (Br. 36-37.) It was not necessary to allege affirmatively in the answer that taxpayer concealed 200 cases of whiskey and the manner in which it was accomplished. The amount which was concealed more nearly approximates that on which the additional floor stocks taxes were assessed. The fact that the additional assessment was made implied that taxpayer had distilled spirits on hand which were not inventoried and any evidence to so show was relevant and material to the issue.

So far as the record shows taxpayer had Three Rivers whiskey stored at the San Francisco warehouse and nothing else. It cannot be assumed that he withdrew from the warehouse anything other than what he had stored there. The only reasonable presumption is that the cases contained whiskey. Exhibit A in evidence shows the withdrawal of 200 cases of whiskey from the warehouse by the taxpayer on March 31, 1944, and that is not disputed.

The evidence proves beyond a doubt that taxpayer wilfully and intentionally concealed distilled spirits so as to avoid the payment of tax. The Court's conclusions of law must therefore be sustained.

CONCLUSION.

There is substantial evidence in the record to sustain the findings of fact, conclusions of law and the judgment, and no reversible error having been committed by the District Court, the judgment of the lower Court must be affirmed.

Dated, San Francisco, California,
October 4, 1950.

Respectfully submitted,

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No. 12,530

IN THE

United States Court of Appeals
For the Ninth Circuit

NICK W. MAROOSIS,

Appellant,

vs.

JAMES G. SMYTH, United States Col-
lector of Internal Revenue,

Appellee.

On appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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Subject Index

	Page
Appellant's statement of facts is accepted by appellee.	1
The correctness of the 96% figure has been established by appellant and has not been disproved by appellee and no underpayment of tax exists	1
Appellant agrees that the best evidence to sustain taxpayer's tax return is his books	9
Appellee has not sustained his burden of proving fraud by clear and convincing evidence	10
Appellee admits his case is based on groundless suspicions and unwarranted assumptions	15
An assessment based on an admittedly erroneous estimate is not lawful	16
Appellees have not distinguished cases cited by appellant on arbitrary assessments from the present case.	17
Appellee's contention that appellant would not draw whiskey from warehouse except to defraud government is erroneous	18
Conclusion	19

Table of Authorities Cited

	Page
Harris v. Commissioner (1948 P.H. T.C. Memo. Dec., par. 48,235)	18
Helvering v. Taylor, 293 U. S. 507	17
Hemphill Schools, Inc. v. Commissioner, 137 F. (2d) 961	8
J. M. Perry v. Commissioner (C.C.A. 9), 120 F. (2d) 123	7
McDonald v. Commissioner (1944 P.H. T.C. Memo. Dec., par. 44,363)	17
San Joaquin Brick Co. v. Commissioner, 130 F. (2d) 220	8
Stratton v. Commissioner (1949 P.H. T.C. Memo. Dec., par. 49,143)	18
United States v. United States Fidelity & Guaranty Co., 144 Fed. 866	16
United States Fidelity & Guaranty Co. v. United States, 220 Fed. 592	16
Ward v. Commissioner (1948 P.H. T.C. Memo. Dec., par. 48,133)	18

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APPELLANT'S REPLY BRIEF.

**APPELLANT'S STATEMENT OF FACTS IS ACCEPTED
BY APPELLEE.**

Since appellee did not challenge the statement of the case made in appellant's brief, that statement is apparently acceptable.

THE CORRECTNESS OF THE 96% FIGURE HAS BEEN ESTABLISHED BY APPELLANT AND HAS NOT BEEN DISPROVED BY APPELLEE AND NO UNDERPAYMENT OF TAX EXISTS.

The primary assessment in this case was based upon a formula, in which the only figure in dispute is the percentage of distilled spirit sales during the period

in question. *Although the major issue* in this case is whether the 86% or 96% figure is the correct one in the formula, *only one paragraph* in the brief for appellee (pp. 15-16) is directed to that point. If the 96.41% figure is correct, no under-declaration of inventory by appellant exists. In the absence of an under-declaration, we find appellee attempting to prove an act was done with a fraudulent intent by attempting to prove the intent without proving the act.

Appendix A of brief for appellant sets forth each figure used by the State Board in determining the 96.41% figure. Appendix A traces each figure in the State audit to the books and records of appellant in evidence. *Appellee's brief is silent on this point.*

Appellant's brief cited the testimony of J. Bruck, C.P.A., wherein he set forth the method used by the State Board to reach the figure of 96.41%, and that his own check showed the correctness of said audit. (Tr. p. 172; Brief for Appellant, p. 19.) *Appellee's brief is silent on this point.*

Appellee's only objection at the trial to the State audit was that it did not determine sales at ceiling prices. (Tr. pp. 268, 269; Brief for Appellant, p. 18.)

Appellant's brief pointed out explicitly how the State audit determined distilled spirit sales at ceiling prices (Brief for Appellant, p. 21) and that alleged over-ceiling sales were neither founded on the evidence nor were they material to this case. (Brief for

Appellant, pp. 34-36.) *Appellee's brief is silent on this point.*

It is truly significant that appellee failed to dispute one single figure in the State Board audit.

Furthermore, by complete silence on the alleged over-ceiling sales, appellee has evidently *completely abandoned its only objection on the trial to the 96.41% figure.*

Not one single factual reference is cited by appellee to support the 86% figure. Appellee is satisfied to let his argument rest with: "Thus the determination of the Commissioner was made upon the taxpayer's own estimate. Wherein then is it arbitrary?" (Br. for Appellee, p. 17.)

It is wrong basically because where actual figures exist, estimates are pure guesses. Appellant has answered this question fully in his brief. (Brief for Appellant, pp. 13-28, 39-42; Appendix A.) Appellee has not even attempted to answer those arguments.

Failing to support the 86% figure, appellee set forth six defenses to the 96% figure:

I. "Taxpayer has failed to attack the correctness of the formula used except to say that instead of using 86% the agent should have used 96% because that is the per cent used by the State auditor to determine the quantity of distilled spirits in proportion to the gross sales." (Brief for Appellee, p. 15.)

That statement is wholly incorrect. Nowhere does appellant so contend. Appellant *never urged* the use

of 96% because “that is the per cent used by the State Auditor.” Appellant urged the use of the 96% figure because the State Auditor determined that it was the *correct* percentage of distilled spirits sold. It was arrived at by actual audit—not by “estimates” or by guesswork. Appendix A of brief for appellants is indisputable.

The purchase figures and the gross sales figures in the formula were taken from the records of the taxpayer. The conversion into proof gallons is simple arithmetic. The only figure in the formula open to question was the 86%. Every figure in the State audit was derived from the books and records of the appellant and the 96 per cent determination can be made from the records in evidence independent of the State Board audit. (See Appendix A, Brief for Appellant.)

II. “The period of time involved in the State Auditor’s calculation was from July 1, 1943, to June 30, 1944; only three quarters of which cover a portion of the period prior to the taxpayer’s floor stocks tax return.” (Brief for Appellee, p. 15.)

This statement is in error for two reasons: First, the taxpayer sold his business on May 25, 1944, so that the audit covered a period of only ten months and twenty-five days. Second, that audit made a determination of distilled spirits sales for the period June 1, 1943 to March 31, 1944. As set forth in brief for appellant (pp. 22-23), the gross sales exclusive of sales tax as reflected by appellant’s books between July 1, 1943 and March 31, 1944 were \$207,473.58 and

the distilled spirit sales, exclusive of sales tax, for the same period were \$200,025.68. Dividing \$207,473.58 by \$200,025.68 results in 96.41%.

III. "The quantities of distilled spirits sold each month increased and therefore the percentage of distilled spirits sold in relation to total sales from July 1, 1943, to June 30, 1944, would have been greater than during the period from November 1, 1942 to March 31, 1944." (Brief for Appellee, p. 15.)

Appellee in his desire to grasp for straws in the wind even resorts to *ignoring a written stipulation between counsel* in this case. This stipulation is binding. (Tr. 26 to 29.) This stipulation effectively means that if 96.41 per cent of the total sales between July 1, 1943 and March 31, 1944 were distilled spirits sales, *then the entire assessment here in question is in error and the inventory of appellant as of April 1, 1944, upon which the return was based, is accurate*, as analyzed in brief for appellant (pp. 24-27). Appellee is silent on this stipulation.

IV. "Accountant Bruck testified that the 96.41 percentage figure was based upon a figure which included sales tax." (Brief for Appellee, p. 15.)

Counsel for appellee has overlooked the simple arithmetic principle that if the distilled spirits sales *including* sales tax were 96.41 per cent of the total sales including sales tax, then it follows as surely as night follows day that the distilled spirits sales, *exclusive* of sales tax, are still 96.41 per cent of the total sales exclusive of sales tax because all the sales

tax does is increase each figure proportionately, to-wit, by $21\frac{1}{2}\%$.

V. "The figure used was \$91,767.40, total sales for the first three months of 1944 (Tr. 193). The sales from January 1 to March 31, 1944 amounted to \$36,-510.93 as shown by the daily sales records. * * *" (Brief for Appellee, pp. 15-16.)

Please note the words "as shown by *the daily sales records*." This is a misstatement, and an attempt to mislead by omission. Appellee could not substitute for the above quoted phrase: "as shown by *the permanent records*."

The \$91,767.40 represents *total sales* for the first three months of 1944 and was obtained from the appellant's *permanent records*. (Tr. p. 189; Exhibit 14, Section marked "Expense", fourth page from end of section.) In addition to the permanent record, a temporary record was kept by the clerks. (Tr. p. 136.) This was not a part of appellant's permanent records and did not include large case sales (Tr. p. 137), hence, did not include all sales. Mr. Bruck, C.P.A., testified that Exhibit 18 was *a purely temporary record* and that the permanent records of the appellant were Plaintiff's Exhibits 14 and 17. (R. 181 and 205.)

VI. "Bruck testified that without the daily record the sales of distilled spirits could not be determined (R. 191)" (p. 16, Brief for Appellee).

Bruck did not so testify. The citation referred to by appellee is with reference to the "details" of some

\$62,946.84 in sales. (Tr. 191.) No permanent record contains detailed sales. Does appellee contend that a permanent bookkeeping record must separately list each individual sale?

Mr. Bruck testified appellant kept a double entry set of books which were complete and properly kept; that he could determine appellant's purchases, sales and inventory as of a given period from these records. (TR. p. 165.) *The sales could be determined from the permanent records in evidence and appellee's attempt to discredit this fact is abortive unless he does so from permanent records as distinguished from temporary records.*

Appellee does not contend that the permanent records of appellant do not reflect the total sales for each and every day. There is no requirement of law, accounting principles, or business purpose that would be served by the maintenance of a record of the type suggested by appellee. And appellee has offered no proof of the requirement of such records.

Thus an analysis of the six objections of appellee to the adoption of the 96% figure, discloses not only that they are groundless, but their very weakness only strengthens the unanswered arguments of appellant for the adoption of this figure.

This Court in the case of *J. M. Perry v. Commissioner* (C.C.A.-9) (120 F.(2)123) stated on page 124 with regard to findings of the Bureau of Internal Revenue:

“This finding is presumptively correct, that is, until the taxpayer proceeds with competent and

relevant evidence to support his position, the determination of the Commissioner stands. When such evidence has been adduced the issue depends wholly upon the evidence so adduced and the evidence to be adduced by the Commissioner. The Commissioner cannot rely upon his determination as evidence of its correctness either directly or as affecting the burden of proof. *Welch v. Helvering*, 290 U.S. 111, 115, 54 S. Ct. 8, 78 L. Ed. 212, *Helvering v. National Grocery Co.*, 304 U.S. 282, 294, 295, 58 S. Ct. 932, 82 L. Ed. 1346; *Helvering v. Talbott's Estate*, 4 Cir., 1940, 116 F.(2d) 160, 162''.

This Court reiterated this rule in *San Joaquin Brick Co. v. Commissioner*, 130 F.(2) 220, and *Hemp-hill Schools, Inc. v. Commissioner*, 137 F.(2) 961.

Appellant has presented overwhelming evidence to support the 96.41 per cent figure. Appellee offers no factual support of the 86% figure. He urges its acceptance with the arbitrary contention that since it was appellant's estimate he cannot complain if it was used. We can only conclude that 96.41% is the correct percentage of distilled spirits sold from July 1, 1943 to March 31, 1944 and therefore the primary assessment is erroneous and illegal. If the primary assessment is baseless, it follows that the fraud penalty is necessarily in error.

**APPELLANT AGREES THAT THE BEST EVIDENCE TO SUSTAIN
TAXPAYER'S TAX RETURN IS HIS BOOKS.**

Appellee in his brief (p. 16) states:

“The best evidence to sustain taxpayer's floor stocks tax return was his books.”

Appellee himself relied on those books and from them obtained the distilled spirits purchases and the gross sales used in his formula. (Tr. pp. 264, 265.) The State Board took its figures from these same books to arrive at the 96.41% figure. Mr. Bruck testified that these records were complete and properly kept, and that from them he could determine the appellant's purchases, sales and inventory as of a given period. (Tr. p. 165.)

Appellee claims the books are incomplete on the basis of Mr. Hedrick's opinion. Mr. Hedrick's “opinion” was treated fully at p. 17, Brief for Appellant. Thus we have the situation where appellee states a rule that the best evidence to sustain the return is the taxpayer's books, and then refuses to abide by an audit of those very books, or to audit them himself.

Furthermore, in the report of the State auditor (Tr. p. 19), we find a specific statement that the records were such as were required by law from which could be determined the percentage of distilled spirits sales.

Appellee's statement that appellant did not produce his books for 1943 is an error, either calculated or mistaken—but an error nevertheless. The permanent records of appellant for the entire period were in

evidence. (Tr. pp. 181, 205.) It was only a part of Ex. 18, a temporary record, which was missing. The daily sales records were incomplete in that they contained only non-case sales. As appellee himself states, these records showed only \$36,000 of the \$91,767.40 sales during the first three months of 1944. When appellee, himself, sought the sales figures for his formula, he took them *not from the daily sales records but from the permanent records*. (R. 265.)

Certainly, counsel for appellee must have had his tongue in his cheek when he wrote:

“The taxpayer has failed to produce any evidence to show the extent to which the Commissioner’s assessment is wrong. * * *” (Brief for Appellee, p. 17.)

We have a concession in the use of the word “extent”. The “extent” is the difference between 86% and 96.41% or 10.41% of the gross sales which by stipulation of counsel (pp. 26-29) wipes out the primary assessment. The appellee has ably adopted a classical application of the maxim, “If you can’t convince ’em, confuse ’em.”

**APPELLEE HAS NOT SUSTAINED HIS BURDEN OF PROVING
FRAUD BY CLEAR AND CONVINCING EVIDENCE.**

Appellee presents five contentions re the fraud penalty.

I. Truck movements on March 31, 1944 (Brief for Appellee, pp. 9-10).

Appellant covered this fully in his opening brief. (Brief for Appellant, pp. 28-30; p. 43.) Any "suspicions" that might have been aroused by the truck movements are eliminated by the fact that the 96.41 figure should have been used in the formula.

The appellee finds himself in the position of contending that the so-called truck movements confirm the erroneously calculated understatement and the erroneous understatement confirms his suspicions with regard to the truck movements. Appellee argues that suspicions plus estimates are better evidence than accepted records and audits.

Not once did appellee's agents ask appellant for an explanation of this alleged movement of goods. When the fraud penalty was assessed, *no reference was made* to said truck movements, but said penalty was based purely on the amount of the computed deficiency arrived at by the use of the estimated 86% figure. (Schedule II, Appendix B, Brief for Appellant.)

Appellee's answer made no reference to concealment of whiskey but alleged that the underdeclaration was caused "by errors and omission in the records kept by the plaintiff at his place of business". (Defendant's Answer, Par. VI, Tr. p. 20.)

II. Sales of March 30 and 31, 1944 by appellant do not account for 400 cases of whiskey withdrawn from the warehouse on March 30 and 31, 1944. (Brief for Appellee, pp. 10, 13, 14, 17, 22.)

Appellee contends that appellant's records do not account for the sale of the 400 cases of Three Rivers drawn from the warehouse on March 30 and 31, 1944, because the sales on those days were \$2,433.06 and \$2,663.90, respectively, and based on a selling price of \$33.00 to \$40.00 a case, if 400 cases were sold the sales would have been between \$6,600 and \$8,000 on each of those days. Appellee completely *ignores* the fact that *the appellant declared 271 $\frac{1}{3}$ cases of Three Rivers whiskey*; thus, the sales for the two days *did not have to account* for 400 cases of whiskey, but rather, for the sale of 129 cases. One hundred twenty-nine cases sold for \$33 to \$40 per case would bring \$4,200 to \$5,100 for the two days in question (\$2,433.06 plus \$2,663.90 is \$5,096.96). Thus appellant fully accounted for the 400 cases in the 271 $\frac{1}{3}$ cases reported on hand on March 31, 1944, and the sales on March 30 and 31, 1944.

Since plaintiff's Exhibit 2, the recap of the Geary Store inventory, discloses that Three Rivers whiskey was the only whiskey in the store, it represented the sole source of sales income.

It is an open and notoriously known fact that in March of 1944, whiskey supplies were scarce. The sale of the Three Rivers withdrawn prior to March 30, 1944 are accounted for in the sales for February and March. Appellee examined every purchase invoice at the source of supply and was fully aware of the fact that appellant had received no other brands of whiskey in amounts sufficient to account for his sales.

Yet appellant states, on page 11 of his brief: "It is a reasonable assumption under the evidence that the Three Rivers whiskey reported in taxpayer's tax return was that remaining from withdrawals made from the warehouse before March 30th, 1944." No citation from the record is given in support of this "assumption", and there is no such evidence.

III. Appellant did not know how many cases of Three Rivers whiskey were on hand, on the opening of business on March 30 and 31, 1944 (Brief for Appellee, p. 11).

Appellee takes appellant to task because he could not testify to the number of cases of Three Rivers on hand *at the opening of business* on March 30 and 31, 1944.

No law required appellant to have this knowledge. Appellant was not active in the operation of this store. He had two other stores he owned and operated. The law required that appellant take an inventory as of the *close* of business on March 31, and not at the beginning of business on March 30 or 31.

IV. Appellant reported 100 cases of Three Rivers whiskey which appellant testified were at the Haight Street store but appellee denies the said 100 cases were at said store (Brief for Appellee, p. 11).

As is set forth in appellee's brief (p. 11), appellant reported 271 $\frac{1}{3}$ cases of Three Rivers whiskey, 100 of which cases appellant testified were in the Haight Street store basement on April 1, 1944. Appellee's

witness, Hedrick, denied this. Appellant demonstrated conclusively that Hedrick was put on notice of merchandise stored elsewhere. (Brief for Appellant, pp. 30-34.) The only question was the location of said 100 cases for it *was granted that appellant reported them*. Appellant also pointed out that Hedrick admitted that he never went into the basement. (Brief for Appellant, p. 258.)

V. Appellant failed to report 100 cases of Three Rivers whiskey which appellee claims were at the Haight Street store (Brief for Appellee, p. 13).

As above pointed out, appellee *denied* there were 100 cases of Three Rivers at Haight Street store (Brief for Appellee, p. 11.)

Now to sustain his assessment he argues that *there were* 100 cases of Three Rivers at Haight Street but they were not reported.

Appellant detailed the respective inventories of the Haight and Geary stores and the actual entries therein which established conclusively that the 100 cases at the Haight store were reported. (Brief for Appellant, pp. 30-34.) Appellee has, as he has done throughout his argument, kept a hands off attitude of the appellant's records and inventories. Not one word is contained in appellee's brief respecting the inventories above mentioned.

The trial Court found that *appellee's* inventory of May 2, 1944 did not include the said 100 cases at the Haight Street store. Hence an overstatement re-

sulted. Since 40 of the 100 cases had been removed before May 2, the remaining 60 cases wiped out the alleged 108 proof gallon overdeclaration. (Tr. pp. 91, 179.)

**APPELLEE ADMITS HIS CASE IS BASED ON GROUNDLESS
SUSPICIONS AND UNWARRANTED ASSUMPTIONS.**

Appellee effectively admits the weakness of his case on page 14 of his brief, wherein he challenges appellant's statement that appellee's evidence is unproved suspicion, with,

"Surely it will not be said that the withdrawal of 400 cases of whiskey from the warehouse on March 30 and 31, 1944, and the fact that taxpayer's records for those days failed to show sales of such quantities was immaterial. This evidence goes to the very heart of the case."

As we set forth above, the appellant declared 271 $\frac{1}{3}$ cases on March 31, 1944, and his records could not therefore show sales of 400 cases but rather the sale of some 129 cases.

No better example of the weakness of appellee's position can be shown than that of appellee's argument on page 17 of his brief. After a series of assumptions and conclusions, unsupported by record citations, appellee's attempt to account for the shortage of 600 cases utterly fails. (R. 17.) He finally reaches an alleged shortage of 500 cases, but the

method adopted is as arbitrary and baseless as is the primary assessment.

Appellee assumes that none of the 400 cases were sold. There is no evidence to support this assumption. Appellee next *assumes* that the 100 cases at Haight Street were not reported. Hence he arrives at a 500-case shortage.

He ignores entirely the fact that 129 of the 400 cases were sold on March 30 and 31, 1944. He ignores the fact that appellant reported $271\frac{1}{3}$ cases on hand on April 1, 1944. He ignores entirely the fact that the 100 cases at Haight Street were reported and also that this 100 cases was part of the 400 cases.

As appellant stated in his brief, only 775 cases of Three Rivers whiskey were ever purchased by appellant. (See, also, Brief for Appellee, p. 9.) Appellant reported $271\frac{1}{3}$ cases leaving only 500 cases to be accounted for, even if none were sold. Appellee claims a shortage of 600 cases. Appellant sold Three Rivers during February and March, when whiskey was in tremendous demand due to the war shortages.

**AN ASSESSMENT BASED ON AN ADMITTEDLY ERRONEOUS
ESTIMATE IS NOT LAWFUL.**

Appellee states that an assessment based upon an estimate is lawful. Appellee cites as authority *United States v. United States Fidelity & Guaranty Co.*, 144 Fed. 866, and *United States Fidelity & Guaranty Co. v. United States*, 220 Fed. 592. The latter case did

not involve any question of an assessment based on an estimate. In the former case there was no discussion of the law or of the facts other than the one sentence statement that an assessment based upon an estimate is lawful. While the use of estimates based upon facts in evidence is probably proper in some cases, *erroneous estimates contrary* to facts are no basis for an assessment.

APPELLEES HAVE NOT DISTINGUISHED CASES CITED BY APPELLANT ON ARBITRARY ASSESSMENTS FROM THE PRESENT CASE.

Appellee distinguished *Helvering v. Taylor*, 293 U.S. 507, on the theory that there was no presumption of correctness of the commissioner's determination as it was an appeal from the Tax Court. Of course this statement of law is incorrect as the same presumption of correctness applies in the Tax Court as in the District Court and the Supreme Court said in *Helvering v. Taylor*, on page 515:

“Unquestionably the burden of proof is on the taxpayer to show that the commissioner's determination is invalid * * *”

Appellee distinguishes *McDonald v. Commissioner* (1944 P.H. T.C. Memo. Dec., par. 44,363) on the ground that in that case the Commissioner assumed a 10% profit without evidence whereas here the estimate was made by the taxpayer. This distinction is one without a difference. Does appellee contend that if the taxpayer in the *McDonald* case had made a

10% profit estimate he would have been bound by that estimate even though the records and other evidence showed that the estimate was wrong?

The same distinction is made with regard to *Harris v. Commissioner* (1948 P.H. T.C. Memo. Dec. par. 48,235) by the appellee. However, in that case, the taxpayer *did supply the estimate* that was erroneously used by the Commissioner. Also the Court pointed out that the taxpayer was charged with the possession of sums based on a formula when there was no evidence to show the actual possession of such sums. The similarity to the present case is precise.

Appellee distinguishes *Ward v. Commissioner* (1948 P.H. T.C. Memo. Dec., par. 48,133) and *Stratton v. Commissioner* (1949 P.H. T.C. Memo. Dec., par. 49,143) on the grounds that they hold that an assessment without foundation, excessive, and not consistent with surrounding circumstances is illegal. Our brief points out that the assessment in this case is also without foundation, excessive, and contrary to the facts. The cases are therefore in point.

**APPELLEE'S CONTENTION THAT APPELLANT WOULD NOT
DRAW WHISKEY FROM WAREHOUSE EXCEPT TO DE-
FRAUD GOVERNMENT IS ERRONEOUS.**

Appellee concludes that the taxpayer would not have drawn whiskey from the warehouse except to avoid declaring it in his return and thus this proves intent to defraud. (Brief for Appellee, p. 22.) Appellee further states that appellant has not accounted

for said merchandise. As we previously set forth, the inventories and the sales accounted for said 400 cases in full.

Appellee contends that there was no room in the store for the merchandise. This is contrary to the evidence. Appellant's testimony was that 100 cases were stored at the Haight Street store because of lack of space at Geary Street but the other 300 went to the Geary Street store. (Tr. pp. 78, 79, 80.) Appellee introduced no evidence on this point.

We feel that this Court can take judicial notice of the fact that when consumers are aware that a commodity will rise in price due to a new excise tax, they will purchase larger quantities than normally—prior to the effective date of the tax. This is reflected in appellant's sales in excess of \$5,000 on March 30 and 31, 1944. Thus appellant's reason for removing liquor from the warehouse was based on a sound business purpose.

CONCLUSION.

The brief for appellee does not present one well-founded objection to the appellant's undisputed evidence that 96.41% of the sales between July 1, 1943 and March 31, 1944 were distilled spirit sales. Not one well-founded argument is offered by appellee to support the 86% figure. Therefore the 96.41% figure must be accepted as proper as a matter of law, and thus the entire primary assessment is in error.

There can be no fraud penalty if there is no under-declaration. The argument and testimony of appellee with regard to alleged fraud is based on pure speculation and suspicion, and is groundless. Appellee has failed to offer any evidence to support the fraud penalty, therefore he has failed to meet his burden of proving fraud by clear and convincing evidence.

Dated, San Francisco, California,

October 13, 1950.

Respectfully submitted,

MORRIS M. GRUPP,

LEON SCHILLER,

Attorneys for Appellant.

No. 12,530

IN THE

United States Court of Appeals
For the Ninth Circuit

NICK W. MAROOSIS,

Appellant,

vs.

JAMES G. SMYTH, United States Col-
lector of Internal Revenue,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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FILED

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Subject Index

	Page
Grounds	1
Argument	3

I.

In making its decision as indicated by the opinion the court evidently accepted as proved the appellee's unsupported assertion that the appellant's books contained insufficient or improper entries. Actually, the appellant's books and records are complete in every detail, are in order and fully disclose all information required by law and by good bookkeeping practice needed to determine the correctness of appellant's April 1, 1944, physical inventory	3
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---

II.

In making its decision as indicated by the opinion, the court evidently concluded that even if 96.41% of the total sales were distilled spirits sales, sales by the appellant at above ceiling prices might have left him with extra merchandise on hand at April 1, 1944, which he might not have declared. Actually the question of over-ceiling sales is entirely irrelevant to the issues of this case	6
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III.

The court in making its decision has permitted a finding that two hundred cases of whiskey were moved to an unknown destination to be the basis of a 600-case assessment	9
Conclusion	10

Table of Authorities Cited

	Page
Bergdoll v. Pollock, 95 U.S. 337 (1887)	3

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Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Your petitioners petition for a rehearing of the judgment rendered herein on February 9, 1951, with a written opinion by the Honorable Judge Albert Lee Stephens after a hearing before Judges Stephens, Healy and Bone.

GROUND.

I.

In making its decision as indicated by the opinion, the Court evidently accepted as proved the appellee's

unsupported assertion that the appellant's books contained insufficient or improper entries. Actually, the appellant's books and records are complete in every detail, are in order and fully disclose all information required by law and by good bookkeeping practice needed to determine the correctness of appellant's April 1, 1944, physical inventory.

II.

In making its decision as indicated by the opinion, the Court evidently concluded that even if 96.41% of the total sales were distilled spirits sales, sales by the appellant at above ceiling prices might have left him with extra merchandise on hand at April 1, 1944, which he might not have declared. Actually the question of over-ceiling sales is entirely irrelevant to the issues of this case.

III.

The Court in making its decision has permitted a finding that two hundred cases of whiskey were moved to an unknown destination to be the basis of a 600-case assessment.

ARGUMENT.**I.**

IN MAKING ITS DECISION AS INDICATED BY THE OPINION, THE COURT EVIDENTLY ACCEPTED AS PROVED THE APPELLEE'S UNSUPPORTED ASSERTION THAT THE APPELLANT'S BOOKS CONTAINED INSUFFICIENT OR IMPROPER ENTRIES. ACTUALLY, THE APPELLANT'S BOOKS AND RECORDS ARE COMPLETE IN EVERY DETAIL, ARE IN ORDER AND FULLY DISCLOSE ALL INFORMATION REQUIRED BY LAW AND BY GOOD BOOKKEEPING PRACTICE NEEDED TO DETERMINE THE CORRECTNESS OF APPELLANT'S APRIL 1, 1944, PHYSICAL INVENTORY.

We respectfully call to the attention of the Court that portion of its opinion which states: "The books of a taxpayer are not conclusive either for or against the Collector under all circumstances. *Bergdoll v. Pollock*, 95 U.S. 337 (1877). If taxpayer's books contain insufficient or improper entries, taxpayer must suffer the consequences." In our opinion, it is on the basis of this alleged insufficiency or impropriety of the books that ultimately the Court rejected the 96.41% figure as the correct figure.

All the evidence in this case is contrary to this supposition. A certified public accountant, J. Bruck, was called as a witness by appellant. His qualifications as a certified public accountant were accepted by the attorney for the appellee (Tr. p. 164.)

He testified that appellant kept a double-entry set of books which in his opinion were complete and properly kept, and from an examination of the records of appellant he could determine appellant's purchases, sales and inventory as of a given period. (Tr. p. 165.)

The report of the State Board of Equalization auditor contained the following reference:

“Records.

“1. Do records meet requirements of section 24.4 of the Alcohol Beverage Control Act and the Rules and Regulations issued thereunder?

“Yes.” (Tr. p. 119.)

From the foregoing quotation, it could only be inferred that the records of appellant were such as are required by law, from which records could be determined the percentage of distilled spirits sales against gross sales.

We included in the brief for appellant Schedule I (appendix) which schedule traced every figure in the State Board audit *to the books and records of appellant in evidence in this case*, and we cited the page numbers in said records to which each figure could be traced. Thus it is clear that the statement of the State Board of Equalization auditor regarding the completeness of the records referred to the records in evidence before this Court.

The only testimony offered by appellee regarding the books and records was the testimony of Mr. Hedrick. When Mr. Hedrick was questioned as to what books and records the average retail liquor dealer maintained that the appellant did not maintain, he answered:

“I was getting cross up. I have made a thorough investigation or thorough investigation *only of this particular liquor store*. The other floor stock tax investigations that I made resulted

in no complications that involved searching investigations. *I am unprepared to state from experience such as you have mentioned whether his records are more or less complete than other stores.*" (Tr. p. 272.) (Italics ours.)

Furthermore, the appellee conducted only one audit procedure on the appellant's records. An audit was made of the purchases from the records of the wholesale liquor dealers, and this audit substantiated the accuracy of appellant's records.

The Government did not offer an expert accountant as a witness to support its position regarding the completeness of appellant's books.

Thus the only reason offered by either the appellee or the Trial Court, and the only grounds suggested by this Court for the conclusion that the books were inadequate or incomplete, was the fact that the so-called *daily sales book* did not fully itemize all sales.

The witness Bruck testified that the permanent records of appellant were in evidence in this case as Plaintiff's Exhibit 14 (Tr. p. 181) and Plaintiff's Exhibit 17. (Tr. p. 205.) There is no evidence in the record to contradict this testimony. It is admitted by all parties, and the record shows, that the permanent records contained the *total sales for each day* and the *total sales for each month* and the *total sales for the entire period of the business*. However, we find the entire accounting system of the appellant is rejected because it did not contain a permanent record that listed individually each and every sale made each day.

Appellee does not contend, and never has, that the permanent records of appellant do not reflect the total sales for each and every day. *There is no requirement of law, accounting principle or business practice* that would be served by the maintenance of a record of the type suggested by the appellee, by the Trial Court, and by this Court.

The appellant testified that the so-called daily sales record was a record maintained by the clerk so that a determination could be made that the clerk deposit all cash received by him. (Tr. p. 136.) A mere examination of Exhibit 18, the so-called daily sales record, supports the appellant's testimony. The exhibit is a group of notebooks, obviously never intended to be retained as a permanent record, and to be used merely as a day-to-day check on the clerks, after which daily check they serve no purpose.

II.

IN MAKING ITS DECISION AS INDICATED BY THE OPINION, THE COURT EVIDENTLY CONCLUDED THAT EVEN IF 96.41% OF THE TOTAL SALES WERE DISTILLED SPIRITS SALES, SALES BY THE APPELLANT AT ABOVE CEILING PRICES MIGHT HAVE LEFT HIM WITH EXTRA MERCHANDISE ON HAND AT APRIL 1, 1944, WHICH HE MIGHT NOT HAVE DECLARED. ACTUALLY THE QUESTION OF OVER-CEILING SALES IS ENTIRELY IRRELEVANT TO THE ISSUES OF THIS CASE.

96.41% of the total sales for the period July 1, 1943, to March 31, 1944, equals the amount of \$200,-025.28. (Stipulation par. 4; Tr. p. 27.) If this amount represents sales at ceiling prices, the accuracy of

appellant's physical inventory of April 1, 1944, is established.

While the appellee offered testimony at the trial regarding certain alleged over-ceiling sales by the appellant, appellee's counsel did not refer to said testimony in his brief. Counsel for appellee remained silent although the brief for appellant discussed in detail the testimony regarding alleged over-ceiling sales and concluded that there was no evidence to sustain the contention of appellee. (Brief for Appellant pp. 34-36.) However, this Honorable Court suggested that appellant may have made sales above ceiling prices leaving him extra merchandise on hand which he might be expected to make an effort to conceal.

It has been agreed throughout this case that the OPA mark-up was approximately 33% on cost, or a gross profit of 25% on the selling price. It therefore appears obvious to counsel for appellant that if the recorded sales include merchandise sold in excess of ceiling prices, the gross profits per the records of appellant's liquor store would greatly exceed the 25% gross profits permitted under OPA regulations.

We refer this Honorable Court to Mr. Hedrick's testimony (Tr. p. 45) in which Mr. Hedrick admits that he never made an examination of the records to determine what the gross profits were. However, Mr. Bruck, the appellant's witness, testified that he made a determination of the gross profit per the records for 1943 and for the first three months of 1944. Mr. Bruck testified that the gross profit for 1943 was

27.87% and for January 1, 1944, to March 31, 1944, was 25.89%. When we are dealing with general averages, it is accepted that the individual cases will vary to some slight degree. These gross profit percentages prove most conclusively that the sales per the permanent records do not include sales in excess of ceiling prices.

It is actually a moot and irrelevant inquiry to consider the possibility that appellant either might or might not have dealt in over-ceiling sales that were not deposited in the bank or entered in his books. The question in issue is whether the appellant sold merchandise with a retail sales value of \$200,025.28 at ceiling prices between July 1, 1943, and March 31, 1944. The State Board determined the actual cost of merchandise sold between July 1, 1943, and April 1, 1944. They then added $33\frac{1}{3}\%$ to this cost of sales and thus arrived at the appellant's sales at ceiling prices. Each figure in that audit was taken from appellant's books and appellee's audit verified the purchase figures in appellant's books.

The books reflect the sales at ceiling prices. We know that the purchases were recorded at ceiling prices because they were audited by the appellee and found to be correct. We know that the sales were recorded at ceiling prices because the gross profits per the records were approximately 25%. The question of whether the appellant may have exacted illegal payments in excess of ceiling prices which he then pocketed is not in issue in this case unless he is being tried for the crime of exacting said illegal payments.

III.

THE COURT IN MAKING ITS DECISION HAS PERMITTED A FINDING THAT TWO HUNDRED CASES OF WHISKEY WERE MOVED TO AN UNKNOWN DESTINATION TO BE THE BASIS OF A 600-CASE ASSESSMENT.

Counsel for appellant is presently of the opinion, and has always been of the opinion, that with the substitution of the 96.41% figure for the 86% figure in the calculated inventory formula, appellant has sustained the accuracy of his physical inventory and fully accounted for all merchandise purchased by him prior to April 1, 1944.

However, if this Court concludes that we have not met the burden of accounting for the two hundred cases of liquor moved from the warehouse on March 31, 1944, then the primary assessment must be limited to the two hundred cases rather than to six hundred cases.

The Court said on page 6:

“Taxpayer was bound to produce the best available evidence to explain the occurrences viewed by the Collector’s agents and the omissions and inconsistencies in his books.”

If the Court concludes that it is still not satisfied that we have explained the occurrences viewed by the agents, namely the so-called truck movements, and have not accounted for this merchandise, we respectfully urge that at the most, we can be said to have failed to dispose of the propriety of a primary assessment on the two hundred cases.

But the opinion of the Court that appellant has not offered the best evidence to explain omissions and inconsistencies in his books is clearly contrary to all the evidence in this case *because no omissions or inconsistencies in those books have ever been established*. What or where are the omissions or inconsistencies? We respectfully ask this Court this question: What evidence could the appellant possibly offer to combat the assessment here in question except by proof of the proper figure to be substituted in the calculated inventory formula in place of the incorrect sales figure used by the appellee?

CONCLUSION.

Appellant respectfully submits that this Court, in the writing of its opinion, erred in the respects hereinbefore set forth, and that a rehearing in this matter should be had.

Dated, San Francisco, California,
March 12, 1951.

Respectfully submitted,

MORRIS M. GRUPP,

LEON SCHILLER,

*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

We hereby certify that in our opinion the grounds as stated in the foregoing petition for rehearing are well founded and said petition is not interposed for the purpose of delay.

Dated, San Francisco, California,
March 12, 1951.

MORRIS M. GRUPP,
LEON SCHILLER,
*Attorneys for Appellant
and Petitioner.*



No. 12531

United States
Court of Appeals
For the Ninth Circuit.

STATE FARM MUTUAL AUTOMOBILE IN-
SURANCE COMPANY, a Corporation,
Appellant.

vs.

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter, de-
ceased,
Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

FILED

JUL 10 1950

PAUL P. O'BRIEN,

No. 12531

United States
Court of Appeals
For the Ninth Circuit.

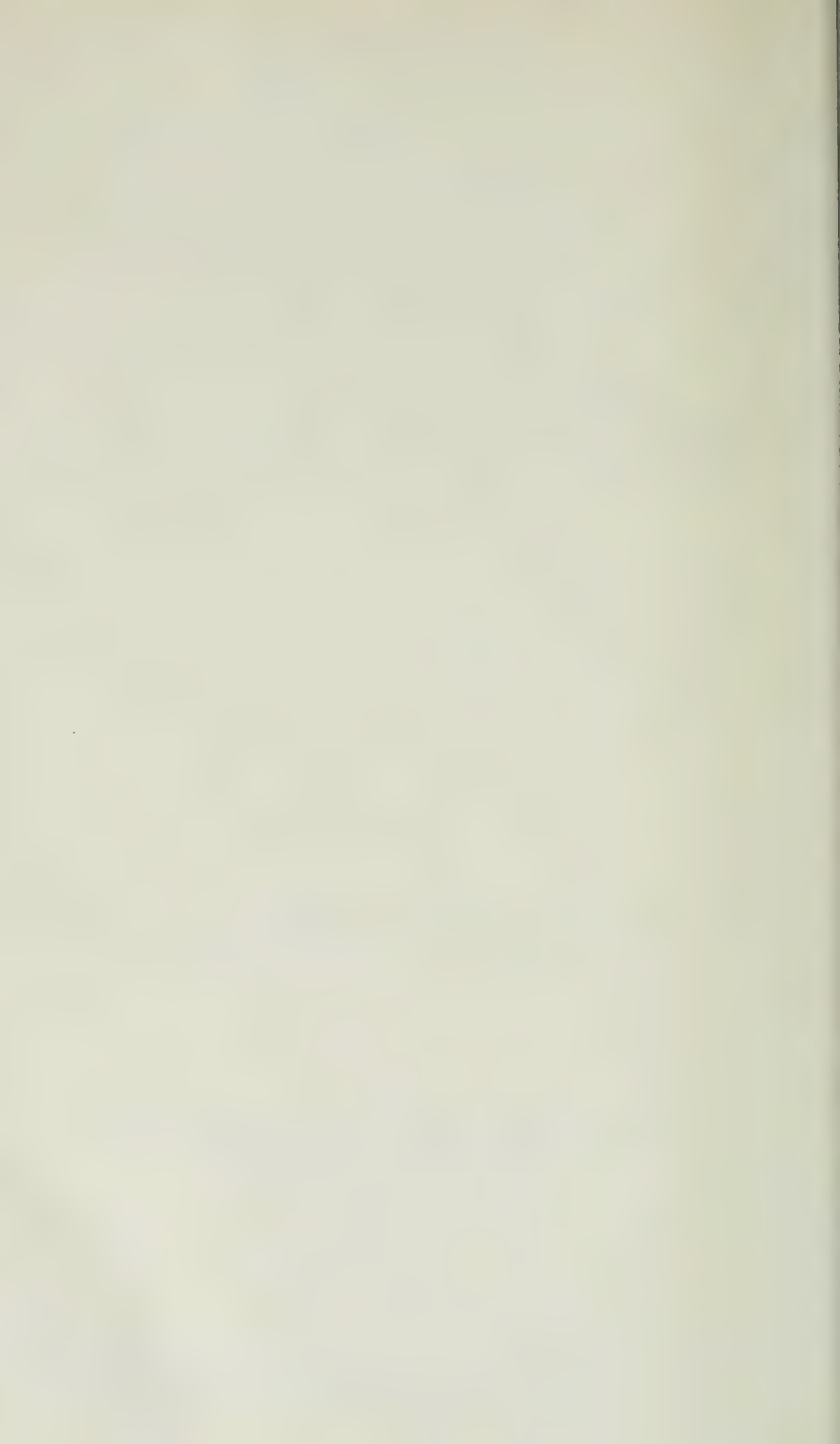
STATE FARM MUTUAL AUTOMOBILE IN-
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Appellant.

vs.

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Appellee.

Transcript of Record

Appeal from the United States District Court
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer of Defendant The State Farm Mutual Automobile Ins. Co. to Complaint.....	11
Exhibit A—Standard Service Automobile Policy	30
Appeal:	
Certificate of Clerk to Record on.....	259
Designation of Parts of Record Deemed by Appellant to Be Necessary for Consider- ation of the.....	264
Designation of the Portions of the Record, Proceedings, and Evidence to Be Con- tained in the Record on.....	71
Notice of.....	70
Statement of Points on Which Appellant Intends to Rely on.....	261
Certificate of Clerk to Record on Appeal.....	259
Complaint	2
Designation of Parts of Record Deemed by Appellant to Be Necessary for Consideration of the Appeal.....	264

	INDEX	PAGE
Designation of the Portions of the Record, Proceedings, and Evidence to Be Contained in the Record on Appeal.....		71
Exhibits, Defendant's		
A—Letter Dated July 13, 1948.....		231
B—Notice and Acknowledgment of Non- Liability		234
C—Notice and Acknowledgment of Non- Waiver of Rights.....		250
Exhibits, Plaintiff's:		
No. 1—Standard Service Automobile Policy.		75
2—Photostatic Copy of Affidavit by Mr. Mehlin.....		245 A-C
Judgment on Verdict.....		54
Memorandum Opinion.....		68
Minute Entries:		
March 21, 1950—Order Denying Defend- ants' Motion for Judgment Notwith- standing the Verdict and Denying Motion for New Trial.....		67
Names and Addresses of Attorneys.....		1
Notice of Appeal.....		70
Notice of Denial of Motion for Judgment Not- withstanding the Verdict and in the Alter- native for New Trial.....		73

INDEX

PAGE

Notice of Motion for Judgment and of Motion for New Trial.....	55
Exhibit A —Order	61
A-1—Order	63
B —Order	65
Reporter's Transcript.....	74
Statement of Points on Which Appellant Intends to Rely on Appeal.....	261
Verdict	53
Witnesses, Defendants':	
Bledsoe, Leighton M.	
—direct	218
—cross	239
Crane, G. Henry (Deposition)	
—direct	122
—cross	125
Dennis, John	
—direct	189
—cross	194
—redirect	202
Gripenstraw, Louis	
—direct	208
—cross	211
Hunt, William R.	
—direct	152
—cross	173, 203
—redirect	188
—recross	188

	INDEX	PAGE
Witnesses, Defendant's (Continued):		
Mehlin, Carol Doris (Deposition)		
—direct		143
—cross		147
Mehlin, Wilbur M. (Deposition)		
—direct		126
—cross		135
—redirect		141
Witness, Plaintiff's:		
Castro, Augustus		
—direct		81
—cross		98

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District Court of the United States, Northern
District of California, Southern Division

No. 28769R

BERTHA LEE PORTER, as Special Adminis-
tratrix of the Estate of Charles E. Porter, De-
ceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, THIRD DOE,

Defendants.

COMPLAINT

Comes now the plaintiff above named and for
cause of action against the above-named defendants
alleges as follows:

As a First Cause of Action

I.

That at all times hereinafter mentioned,

(a) The defendant, The State Farm Mutual
Automobile Insurance Company (hereinafter re-
ferred to as "Company"), was and now is a cor-
poration duly organized and existing according to
the laws of the State of Illinois and authorized to
conduct and were and still are conducting an auto-

mobile insurance business in the City of Berkeley, County of Alameda, State of California;

(b) Wilbur M. Mehlin and First Doe were husband and wife (hereinafter referred to as "Mehlin") and the owners of that certain Ford automobile hereinafter mentioned;

(c) Duane R. Claggett was driving and operating said Ford automobile with the permission of said defendants "Mehlin";

(d) That the amount in controversy herein, inclusive of costs and interest, exceeds the sum of \$3,000.00;

(e) That on the 12th day of July, 1948, the Superior Court of the State of California in and for the County of Contra Costa duly made and entered its order appointing Bertha Lee Porter special administratrix of the estate of Charles E. Porter, deceased.

II.

That plaintiff is informed and believes and upon such information and belief alleges that on the 22nd day of August, 1947, defendant "Company" in consideration of a premium of \$23.70 to it paid by defendants "Mehlin" issued to "Mehlin" its standard service automobile policy No. 72-064-ST-27 whereby defendant "Company" agreed for a period of six months, beginning on the 22nd day of August, 1947, and ending on the 22nd day of February, 1948, to pay on behalf of "Mehlin" all sums which "Mehlin" might become obligated to pay by reason of the liability imposed upon them by law for dam-

ages because of bodily injury, sickness or disease, including care, loss of services and death, at any time sustained by any person or persons, caused by accident or arising out of the ownership, operation, maintenance or use of said Ford automobile and said policy also contained an omnibus clause agreeing to pay on behalf of any person other than said owners of said Ford automobile all sums, not to exceed the sum of \$10,000.00 for the death of one person, which such other person became so obligated to pay arising out of the use of such Ford automobile, provided the actual use of said Ford automobile was with the permission of "Mehlin."

III.

That thereafter on the 31st day of October, 1947, said Claggett was driving said automobile at the intersection of South 47th Street and Access Highway in the City of Richmond, County of Contra Costa, State of California, and Charles E. Porter was crossing said intersection on foot and at said time and place said Claggett so carelessly drove and operated said automobile that the same through the carelessness and negligence of said Claggett ran into and collided with said Charles E. Porter, thereby injuring said Charles E. Porter and as a proximate result thereof Charles E. Porter died on the 1st day of November, 1947, and left surviving him as his only heirs at law plaintiff, his wife, and his children, Charles Earl Porter, a minor, John Richard Porter, a minor, and Patricia Sue Porter, a minor.

IV.

That thereafter on or about the 19th day of December, 1947, plaintiff instituted an action against said Claggett to recover damages for the death of said Charles E. Porter and thereafter on the 29th day of September, 1948, judgment was rendered in said action in favor of plaintiff and against said Claggett for the sum of \$30,000.00 and costs of suit, which were taxed at the sum of \$121.74, and that no part of said judgment or of said costs of suit has been paid.

V.

That said "Mehlin" have performed all the terms and conditions upon their part to be performed under said standard service automobile policy.

As a Second Cause of Action

I.

Plaintiff realleges, reaffirms and readopts as a part hereof all of the allegations contained in Sub-paragraphs (a), (b), (d), and (e) of Paragraph I, and Paragraphs II, III, IV and V of the First Cause of Action as if the same were specifically set forth herein.

II.

That at all times since July 7, 1948, defendant "Company" has denied all liability under said policy to plaintiff upon the ground that at the time of said accident, Claggett was not using said Ford Automobile with the permission of Wilbur Mehlin.

III.

That the defendant "Company" waived and is estopped from relying on the condition of said policy requiring the use of said automobile to be with the permission of "Mehlin" as follows:

That immediately following said accident said "Mehlin" and Claggett notified the defendant "Company" that said accident occurred on the 31st day of October, 1947, and thereupon said defendant "Company" by its agents, duly authorized thereto, pursuant to said policy, investigated said accident by interviewing said Claggett, "Mehlin" and witnesses to said accident, including the investigating police officers, and at all times after notice of such accident, defendant "Company" had full opportunity to ascertain if Claggett was using said Ford automobile with permission of said Wilbur Mehlin, and did ascertain that Claggett was driving the same with permission of "Mehlin" and each thereof, and thereafter on or about the 30th day of December, 1947, an agent of said defendant "Company" duly authorized thereto interviewed the attorneys for plaintiff and stated to and informed said attorneys that said Claggett was driving said automobile with the permission of "Mehlin" and that there was no dispute as to the permissive use of said automobile by Claggett and that said defendant "Company" would pay to the heirs at law of said Charles E. Porter the sum of \$7,500.00 in full settlement of any and all claims that such heirs had against said Claggett by reason

of the death of said Charles E. Porter, and that at said time said attorneys informed said agent that said action could not be settled for less than the limits of said insurance policy and said agent informed said attorneys that he would have to contact the office of defendant "Company" in Bloomington, Illinois, as the policy was issued by its office there and that the office of said "Company" in said City of Berkeley, California, did not have power to increase said offer without the approval of said office at Bloomington, Illinois; that plaintiff and her attorneys at all times since said 30th day of December, 1947, have in good faith relied upon the representations of said agent that said use of said Ford was with the permission of "Mehlin" and have made no effort to secure evidence as to the permission to Claggett to use such Ford, and that evidence of such permission can be secured, if at all, with extreme difficulty and great expense, and the opportunity of plaintiff to obtain evidence concerning such use has been materially prejudiced by said representation of said agent and the acts and conduct herein set forth of said agents and attorneys for defendant "Company," upon which representation and conduct plaintiff has relied.

On the 13th and 22nd days of January, 1948, the same agent for said company again informed attorneys for plaintiff that said defendant would pay said sum of \$7,500.00 in full settlement to the heirs of said Charles E. Porter; that on the 28th day of January, 1948, another agent of said defendant

“Company” informed said attorneys that the board of said defendant “Company” was holding a meeting and they would ascertain whether they could pay anything in excess of the sum of \$7,500.00 in settlement of said claim; that thereafter on the 5th day of February, 1948, the agents of said company informed said attorneys that they could not increase the offer to settle the said action in excess of \$7,500.00 and that if the heirs of said decedent would not take said sum in full settlement, it would be necessary to refer such action to the “Company’s” attorneys for its defense, and requested the attorneys for said heirs to extend the time of said defendant Claggett to answer the summons and complaint in said action to and including the 17th day of February, 1948, and said attorneys for said heirs executed a stipulation in writing extending the time of defendant to answer to and including the 17th day of February, 1948; that thereafter said defendant “Company” employed the law firm of Dana, Bledsoe and Smith to defend said Claggett pursuant to the terms of said policy. On the 17th day of February, 1948, Dana, Bledsoe & Smith, as attorneys for said “Company” prepared an Answer to such complaint on behalf of said defendant Claggett, in which it was admitted that Claggett was driving said Ford with the permission of “Mehlin” and Paul C. Dana, of the firm of Dana, Bledsoe & Smith, verified such Answer on behalf of said Claggett; that thereafter on February 25, 1948, said Dana, Bledsoe & Smith requested that a

deposition be arranged of plaintiff for Friday, March 26, 1948, at 4 p.m. at said Dana's office; that thereafter on the 9th day of March, 1948, said Dana, Bledsoe & Smith informed attorneys for plaintiff that the action was one which they desired to settle on behalf of said Claggett and that they would endeavor to settle the same; that on the 12th day of March, 1948, said Dana, Bledsoe & Smith entered into a written stipulation that said action be set for trial on the 7th day of July, 1948, and pursuant to such stipulation, said action was set for trial on the 7th day of July, 1948; that during the week of June 28, 1948, said attorneys for Claggett requested attorneys for plaintiff for a continuance of the trial of such action on the ground that Paul C. Dana was handling the defense of the case and that said Dana had been on trial for several weeks and his health required him to take a vacation and he could not try such action on July 7, 1948. That on or about the 3rd day of July, 1948, said attorneys for Claggett informed said attorneys for plaintiff that they would not be able to try said action on the 7th day of July, 1948, as they had not been able to locate said Claggett and that it would be necessary to have a continuance; that thereafter on or about the 7th day of July, 1948, said attorneys for Claggett prepared an Affidavit on behalf of said Claggett and on said day presented a Motion for a continuance to said Superior Court and thereafter said Superior Court continued such action to the 14th day of July, 1948,

upon condition that said Claggett pay the expenses of plaintiff by reason of said continuance, and said attorneys for said Claggett agreed to pay such expenses; said Dana, Bledsoe & Smith defended said action on said 14th day of July, 1948, on behalf of said Claggett; on the 26th day of July, 1948, said Dana, Bledsoe & Smith paid the sum of \$99.50 on account of such expenses, and after the rendition of judgment therein made a Motion for a new trial on behalf of said Claggett and argued the same to said Superior Court; that said Motion for New Trial was denied by said Superior Court and since the denial of said Motion for New Trial said Dana, Bledsoe & Smith have withdrawn as attorneys for said Claggett and said defendant "Company" has paid said Dana, Bledsoe & Smith in full for their services as attorneys for said Claggett under said policy;

That said defendant "Company" has waived said permissive use provision of its policy and is estopped by the foregoing conduct of said agents and attorneys on its behalf from denying its liability under said policy.

Wherefore said plaintiff prays judgment against said defendant for the sum of \$30,000.00 together with costs of suit herein.

Dated: April 4, 1949.

/s/ AUGUSTUS CASTRO,
COOLEY, CROWLEY &
GAITHER,
Attorneys for Plaintiff.

Demand for Trial by Jury

Pursuant to Rule 39 (b) of the Federal Rules of Civil Procedure, plaintiff above named demands a trial by jury as to any and all issues in the above-entitled matter.

/s/ AUGUSTUS CASTRO,
COOLEY, CROWLEY &
GAITHER,
Attorneys for Plaintiff.

[Endorsed] Filed, April 6, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, THE STATE
FARM MUTUAL AUTOMOBILE INSUR-
ANCE COMPANY, TO COMPLAINT

Defendant, The State Farm Mutual Automobile Insurance Company, for its answer to the complaint in the above-entitled action, admits, denies and alleges as follows:

As to First Alleged Cause of Action

I.

This defendant denies each and every allegation contained in subparagraphs (b) and (c) of paragraph I of the first alleged cause of action of said complaint.

II.

This defendant denies each and every allegation contained in paragraphs II and V of the first

alleged cause of action of said complaint; and, in this connection, this defendant alleges that policy No. 72-064-ST-27 issued to Wilbur Mehlin by defendant contained a declaration numbered 1, as follows:

“The automobile will be principally garaged and used in the above town, county and state.”

The automobile referred to in declaration numbered 1 is a Ford, 1936, two door, eight cylinder, Serial No. 2922886, and is the Ford automobile referred to in the complaint. The town, county and state referred to in declaration numbered 1 is specified in the schedule of declarations as Lancaster County, Lincoln, Nebraska. The above-mentioned insurance policy was issued by defendant in reliance upon the statements in the declarations, including the statement in declaration numbered 1. This defendant is informed and believes, and, upon such information and belief, alleges that on October 31, 1947, and for some time prior thereto, the said automobile was not being principally garaged and used in the County of Lancaster, City of Lincoln, State of Nebraska, but was on the contrary being principally garaged and used in the City of Richmond, County of Contra Costa, State of California, in violation of declaration numbered 1 in said policy and without the knowledge or consent of defendant.

Further, in this connection, this defendant alleges that the schedule of declarations contains the statement that there are no exceptions to the statements and declarations therein. The declaration numbered 4 in said policy is as follows:

“The automobile described herein is fully owned by the insured unless otherwise stated in the exceptions above. If a mortgage owner, conditional vendor or assignee, such as bank of finance company is named above, loss, if any, under Coverage B shall be payable to the named insured and to such additional interest as their interest may appear, and this insurance as to such additional interest shall not be invalidated by any act or negligence of the mortgagor or owner, nor any change in the title or ownership, nor by any error or inadvertence in the description of the automobile until after notice of cancelation of the policy or this agreement shall be given to such mortgage owner, conditional vendor, mortgagee or assignee in the same manner as required to be given to the named insured.”

It is stated that there are no exceptions to said declaration numbered 4, but defendant is informed and believes, and, upon such information and belief, alleges that said declaration numbered 4 was untrue in that there was a mortgage on said automobile during the month of October, 1947, with the First National Bank of Lincoln, Nebraska, and by reason thereof the terms and provisions of said insurance policy were violated and the statements and declarations in said policy were untrue.

III.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph III of the first alleged cause of action of said complaint,

and placing its denial thereof upon that ground, this defendant denies each and every allegation contained in said paragraph III.

IV.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the following allegations contained in paragraph IV of the first alleged cause of action of said complaint, and placing its denial thereof upon that ground, this defendant denies each and every part of the following allegations:

“and that no part of said judgment or of said costs of suit has been paid.”

V.

As and for a Further and Separate Defense, this defendant alleges, upon information and belief, that the Ford automobile referred to in the complaint as being driven by Claggett at the time of the accident was being driven without the permission or consent of Wilbur M. Mehlin and wholly without his knowledge; and, in this connection, said automobile had been removed from the State of Nebraska by the wife of Wilbur M. Mehlin without the knowledge, consent or permission of said Wilbur M. Mehlin and contrary to the laws of said State of Nebraska, and contrary to the terms and provisions of the mortgage contract applying to said vehicle at said time, and further in that connection, that at said time while said vehicle was being operated in California said wife of Wilbur M. Mehlin

had left the State of Nebraska with the purpose and intent of leaving and deserting her said husband, Wilbur M. Mehlin, and with the purpose and intent of abandoning her household in the State of Nebraska and of separating from her husband, and further in this connection, this defendant is informed and believes, and, upon such information and belief, alleges that the said wife of Wilbur M. Mehlin was not at the time she gave permission to Claggett to operate said automobile, nor at any time while she was in California, nor at the time of the happening of the accident referred to in the complaint residing in the same household as Wilbur M. Mehlin.

In connection with the foregoing separate defense, section 8 of conditions in said insurance policy hereinabove referred to provides as follows:

“Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy signed by an executive officer of the Company.”

The insuring agreement of said policy provides as follows:

“State Farm Mutual Automobile Insurance Company agrees with the insured named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the

statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy: * * *”

As to Second Alleged Cause of Action

I.

For its answer to paragraph I of the second alleged cause of action of said complaint, this defendant hereby repeats and makes a part hereof all of its foregoing denials, allegations, admissions and separate defense contained in its foregoing answer to Sub-paragraph (a), (b), (d) and (e) of Paragraph I, and Paragraphs II, III, IV and V of the first alleged cause of action of said complaint.

II.

Answering the allegations of paragraph II of the second alleged cause of action of said complaint, defendant admits that it has denied all liability under the policy herein referred to, but denies that it specified the limited ground that Claggett was not using the Ford automobile with the permission of Wilbur Mehlin.

III.

This defendant denies each and every part of the following allegations contained in paragraph III of the second alleged cause of action of said complaint:

“That the defendant ‘Company’ waived and is estopped from relying on the condition of said

policy requiring the use of said automobile to be with the permission of 'Mehlin' as follows:

"That immediately following said accident said 'Mehlin' and Claggett notified the defendant 'Company' that said accident occurred on the 31st day of October, 1947, and thereupon said defendant 'Company' by its agents, duly authorized thereto, pursuant to said policy, investigated said accident by interviewing said Claggett, 'Mehlin' and witnesses to said accident, including the investigating police officers, and at all times after notice of such accident, defendant 'Company' had full opportunity to ascertain if Claggett was using said Ford automobile with permission of said Wilbur Mehlin, and did ascertain that Claggett was driving the same with permission of 'Mehlin' and each thereof, and thereafter on or about the 30th day of December, 1947, an agent of said defendant 'Company' duly authorized thereto interviewed the attorneys for plaintiff and stated to and informed said attorneys that said Claggett was driving said automobile with the permission of 'Mehlin' and that there was no dispute as to the permissive use of said automobile by Claggett and that said defendant 'Company' would pay to the heirs at law of said Charles E. Porter the sum of \$7,500.00 in full settlement of any and all claims that such heirs had against said Claggett by reason of the death of said Charles E. Porter, and that at said time said attorneys informed said agent that said action could not be settled for less than the limits of said insurance policy and said agent informed said at-

torneys that he would have to contact the office of defendant 'Company' in Bloomington, Illinois, as the policy was issued by its office there and that the office of said 'Company' in said City of Berkeley, California, did not have power to increase said offer without the approval of said office at Bloomington, Illinois;"

At all times denying representations as alleged by plaintiff in paragraph III of the second alleged cause of action of said complaint, this defendant is without knowledge or information sufficient to form a belief as to the truth of the following allegations, and placing its denial thereof upon that ground, this defendant denies each and every part of the following allegations:

"that plaintiff and her attorneys at all times since said 30th day of December, 1947, have in good faith relied upon the representations of said agent that said use of said Ford was with the permission of 'Mehlin' and have made no effort to secure evidence as to the permission to Claggett to use such Ford,"

Answering the following allegations of paragraph III of the second alleged cause of action of said complaint:

"and that evidence of such permission can be secured, if at all, with extreme difficulty and great expense"

defendant alleges no permission was given by Wilbur Mehlin for the operation of the vehicle therein referred to on the part of Claggett and further alleges that any and all evidence on the

subject of permission that was available to defendant was also available to plaintiff and plaintiff's attorneys, and said evidence is still available and can be secured with little difficulty and small expense.

This defendant denies each and every part of the following allegations contained in paragraph III of the second alleged cause of action of said complaint:

"the opportunity of plaintiff to obtain evidence concerning such use has been materially prejudiced by said representation of said agent and the acts and conduct herein set forth of said agents and attorneys for defendant 'Company' upon which representation and conduct plaintiff has relied."

Answering the following allegations of paragraph III of the second alleged cause of action of said complaint:

"On the 17th day of February, 1948, Dana, Bledsoe & Smith, as attorneys for said 'Company' prepared an Answer to such complaint on behalf of said defendant Claggett, in which it was admitted that Claggett was driving said Ford with the permission of 'Mehlin' and Paul C. Dana, of the firm of Dana, Bledsoe & Smith, verified such Answer on behalf of said Claggett";

defendant admits said allegations; and, in this connection, alleges that at the time said answer was prepared and filed neither defendant, nor its attorneys, had any information or knowledge concerning the circumstances of the removal of the said Ford automobile from the State of Nebraska

to the State of California, and, in fact, had only the information from Mrs. Wilbur Mehlin that the automobile in question was being driven with her permission, and that she was the wife of the policy holder and further, in this connection, it is alleged that the answer hereinabove referred to was amended and said amendment was made upon notice and motion and affidavit and upon the order of the Court in which said action was pending, all of which more particularly appears in said action reference to which is hereby made, and the records of said action are by this reference incorporated herein as though set forth at length.

Answering the allegations of paragraph III of the second alleged cause of action of said complaint, commencing on page 6, line 9, with the word "that" and ending on page 7, line 16, with the word "policy," defendant alleges that its attorneys received the file on this case on or about February 7, 1948; that neither the investigation on the facts, nor the investigation on the law relating to the above subject matters had been completed at the time of the commencement of the trial of said action for the reason that neither Claggett nor Mrs. Wilbur Mehlin could be located in the State of California; that defendants attorneys requested a continuance of the trial from July 7, 1948, because of their inability to locate Claggett, and said request for a continuance was refused by the attorneys for the plaintiffs in said action; that the attorneys for defendant thereupon filed an affidavit in support of a motion for a continuance which said affidavit was as follows:

“State of California,

“City and County of San Francisco—ss.

“Leighton M. Bledsoe, being duly sworn, deposes and says:

“That he is an attorney licensed to practice in the courts of the State of California; that he is a member of the firm of Dana, Bledsoe & Smith, who are attorneys for defendant Claggett in the above-entitled action; that affiant’s partner, Paul Dana, has been almost continuously engaged in trial on various cases throughout the latter part of April and through the months of May and June, 1948; that affiant was asked by Mr. Dana at 4:55 p.m. Friday, July 2nd, 1948, to look at the file in the above-entitled case to see if the case was in a proper state for trial and to see if affiant could try the said case on July 7th, 1948; that said Paul Dana advised affiant that he had been trying to get the trial of this case continued until he could return from his vacation, but that a continuance had been refused by counsel for the plaintiffs; that he had been waiting for a report on the law regarding said case but it had not been reviewed nor completed;

“That affiant took the file home the evening of July 2nd and reviewed it; that affiant found the status of the case to be as set forth in Mr. Paul Dana’s affidavit filed herewith; that affiant telephoned to Mr. Louis V. Crowley, one of counsel for plaintiffs in said action, on Saturday morning, July 3rd, 1948, and advised Mr. Crowley of the facts related in Mr. Dana’s affidavit, and advised Mr.

Crowley that affiant would ask the Court on the morning of trial for leave to amend the answer of defendant Claggett along the lines suggested in Mr. Dana's affidavit."

LEIGHTON M. BLEDSOE.

"Subscribed and sworn to before me this 6th day of July, 1948.

[Seal] MARIE H. STANLEY,
Notary Public in and for the City and County of
San Francisco, State of California."

That the affidavit of Paul C. Dana therein referred to was as follows:

"State of California,

"City and County of San Francisco—ss.

"Paul C. Dana, being duly sworn, deposes and says:

"That he is an attorney licensed to practice in the courts of the State of California; that he is a member of the firm of Dana, Bledsoe & Smith, attorneys for Defendant Duane R. Claggett in the above-entitled action; that he is the attorney to whom this case was assigned for handling; that he prepared and verified the answer of Duane R. Claggett in February, 1948; that at said time the file on said action then in affiant's possession indicated that the automobile driven by said defendant at the time of the accident was owned by Wilbur Marvin Mehlin and that it was being driven by defendant Claggett with the consent of Mehlin's wife at the

time of the accident; that the circumstances of how the wife had possession, or of how she was empowered to give permission for the use of said automobile were not then revealed in affiant's file; that affiant prepared the answer upon information contained in the file and for that reason admitted that the automobile was *bring* driven with the consent of the defendant Wilbur M. Mehlin; that affiant had not consulted defendant Claggett before preparing and signing said answer; that affiant is informed and believes and upon such information and belief alleges that defendant Claggett can only say that he was driving the car with the permission of Mrs. Mehlin; that shortly after April 19, 1948, affiant received a letter from attorneys Ginsburg and Ginsburg of Lincoln, Nebraska, advising affiant that they were attorneys for defendant Wilbur Mehlin and setting forth the following information:

“‘For your information, the automobile in question was removed from the State of Nebraska by Mrs. Mehlin some time in October, 1947, and without the consent of her husband. This was the aftermath of some domestic difficulty. While in California, Mrs. Mehlin apparently allowed others to use the vehicle, and while it was so used, with her consent, but for no purpose or end of hers, the vehicle was involved in the accident in question. Subsequently, Mr. Mehlin had Mrs. Mehlin arrested for removing a mortgaged vehicle out of the State of Nebraska, and Mrs. Mehlin was brought back to this State.’

“That affiant is informed and believes and upon such information and belief alleges the fact to be that no service of process has been made in this case upon defendant Wilbur M. Mehlin nor upon his wife;

“That following receipt of the foregoing letter affiant caused an investigation to be made into the legal aspects of the alleged permissive use of the automobile in question; that the law of Nebraska will be involved; that one of affiant’s associates has examined the law of California and reported thereon to affiant, but the law of Nebraska has not yet been ascertained by affiant; that it may become important to the other defendants named in this case and not yet served as to whether defendant Claggett had the permission of defendant Wilbur M. Mehlin to use the automobile at the time and place of the accident; that affiant expects to be asked to represent the defendant Wilbur M. Mehlin in this action when or if said defendant is served with process therein;

“That affiant now believes that the admission made in the answer to defendant Claggett to the effect that said Claggett was driving the automobile with the consent and permission of defendant Wilbur M. Mehlin is untrue, incorrect, and in error; that defendant Claggett can only admit that he was driving said automobile with the permission and consent of Mrs. Mehlin; that the ends of justice and the interests of truth require that said answer be amended for the purpose of changing the admis-

sion made by defendant Claggett to the limited effect that said automobile involved in the accident was owned by Wilbur M. Mehlin and was being driven at the time of the accident in question by defendant Duane R. Claggett with the consent and permission of Mrs. Wilbur M. Mehlin.

“Wherefore, affiant prays for leave to amend the answer of defendant Claggett as herein indicated.

“PAUL C. DANA.

“Subscribed and sworn to before me this 2nd day of July, 1948.

“[Seal] MARIE H. STANLEY,

“Notary Public in and for the City and County of San Francisco, State of California.”

That the attorneys for the defendant were ordered to pay the expenses of plaintiff by reason of the continuance and the said expenses were paid as ordered; that Claggett was first interviewed by defendant's attorneys July 13, 1948, the day before the trial of said action; that on said date a reservation of rights agreement was executed by Claggett, the terms of which are as follows:

“Messrs. Dana, Bledsoe & Smith

* * *

“This is to advise you that I agree that your firm, as attorneys and representatives of State Farm Mutual Auto Insurance Company, and also that any of your representatives and any representatives of State Farm Mutual Auto Insurance Company, may participate in any investigation, de-

fense and/or adjustment of the case now pending between Bertha Lee Porter and Charles Earl Porter and John Richard Porter, Minors, by and through Bertha Lee Porter, their Guardian ad Litem, Plaintiffs, vs. Duane R. Claggett, Wilber M. Mehlin, Marvin Mehlin, et al., Defendants, which said case is now pending in the Superior Court of the State of California, in and for the County of Contra Costa, numbered therein 41468, and any such action heretofore taken or to be taken, by you or by any of said representatives is entirely without prejudice to any rights and defenses of the State Farm Mutual Auto Insurance Company under its insurance policy numbered 72-064-ST-27 and any other insurance contract; and it is agreed that any such participation does not and will not constitute an admission of liability on the part of said State Farm Mutual Auto Insurance Company under said and any contract of insurance. I likewise hereby waive any right that I have, or may have, to claim that the State Farm Mutual Auto Insurance Company has waived any right to deny liability under said and any contract of insurance.

“At the same time I in no way waive any of my rights against the State Farm Mutual Auto Insurance Company under said or any contract of insurance.”

That at the time the motion for continuance was made defendant's attorneys fully advised the attorneys for the plaintiff of the position of the

insurance company, defendant herein, with reference to lack of coverage; that thereafter and before the trial of said action the attorneys for the plaintiff waived a jury trial; that the attorneys for the defendant at all times subsequent to the time of making the motion for continuance continued to advise and reiterate to the attorneys for the plaintiff that there was no insurance coverage and that all actions being taken by defendant and its attorneys in said proceedings were being taken under full reservation of rights and solely for the purpose of fulfilling the obligation of attorney and client as between said attorneys and Claggett, and for the further purpose of allowing Claggett plenty of time to secure other attorneys should he so desire and for the purpose of taking any appeal from the judgment entered in said action that he might desire.

Further answering said allegations in paragraph III of the second alleged cause of action of said complaint, defendant denies that the payment of its attorneys for their services was made on behalf of Claggett under its policy of insurance.

Defendant denies each and every part of the following allegations contained in paragraph III of the second alleged cause of action of said complaint:

“That said defendant ‘Company’ has waived said permissive use provision of its policy and is estopped by the foregoing conduct of said agents and attorneys on its behalf from denying its liability under said policy.”

IV.

As and for a Further and Separate Defense, this defendant alleges that its insurance policy, being policy numbered 72-064-ST-27 issued to Wilbur Mehlin on or about August 22, 1947, on a 1936 Ford, two door sedan, contained the following conditions:

“8. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy signed by an executive officer of the Company.”

That the terms and conditions of said policy more particularly appear in Exhibit “A,” attached hereto and incorporated herein as though set forth at length; and, in this connection, defendant alleges that no changes were made on said policy, other than those that appear from said exhibit herein referred to.

Wherefore, this defendant prays that plaintiff take nothing herein, and that this defendant have judgment for its costs of suit herein incurred.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,

Attorneys for Defendant, The State Farm Mutual
Automobile Insurance Company.

State of California,
City and County of San Francisco—ss.

Leighton M. Bledsoe, being first duly sworn, deposes and says:

That he is a member of the law firm of Dana, Bledsoe & Smith, which law firm has its offices at 440 Montgomery Street, San Francisco, California; that said Dana, Bledsoe & Smith are the attorneys for the defendant, The State Farm Mutual Automobile Insurance Company; that the officers of said defendant are absent from said City and County of San Francisco, where affiant has his and said law firm have their offices, and for that reason affiant makes this verification for and on behalf of said defendant; that affiant has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to such matters which are therein stated on his information or belief; and as to such matters he believes the same to be true.

/s/ LEIGHTON M. BLEDSOE.

Subscribed and sworn to before me this 25th day of May, 1949.

[Seal] /s/ HAZEL E. THOMPSON,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBIT A

Standard Service Automobile Policy

State Farm Mutual
Automobile Insurance Company
Bloomington, Illinois
Insuring Agreements

Agrees with the insured named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

Coverage A. Liability or Loss Caused by Any
Private Passenger Automobile

1. Liability: To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, because of bodily injury, sickness or disease, including care, loss of services, and death at any time resulting therefrom, sustained by any person or persons and injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, operation, maintenance or use of

Any Private Passenger Automobile.

2. Medical Payment: To pay the reasonable expense of the necessary medical, surgical, dental, ambulance, hospital and professional nursing services and, in the event of death the reasonable

funeral expense, all incurred within one year from the date of the accident, to or for each person who sustains bodily injury caused by accident and arising out of the operation by the insured of

Any Private Passenger Automobile.

3. Bail Bond Expense: To reimburse the insured for 80% of the amount of any premium or fee paid for a bail bond required of him because of an accident or traffic violation arising out of the use of

Any Private Passenger Automobile.

Coverage B. Damage to or Loss of Described Automobile

4. Comprehensive: To pay for any direct and accidental loss of or damage to the described automobile, hereinafter called loss, but not including loss caused by collision of the described automobile with another object or by upset of the described automobile.

5. Loss of Use: To reimburse the named insured for the expense incurred by him for the rental of a substitute private passenger automobile, including taxicab expense, necessitated by a theft of the entire described automobile.

6. Emergency Road Service: To reimburse the insured for 80% of the expense incurred in connection with the described automobile and away from any garage or service station on account of: (1) delivery of gasoline, oil or loaned battery or

change of tire; (2) mechanical first aid on the highways for a period not exceeding one hour after arrival of mechanic if automobile cannot be operated; (3) towing to nearest garage or service station if automobile will not operate under its own power.

Supplementary Agreements

1. Defense, Settlement, Supplementary Payments: As respects such insurance as is afforded by the other terms of this policy

(a) under Coverage A (1) The Company shall

1. defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company;

2. pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the Company, all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not

exceed the limit of the Company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

(b) the Company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request.

The Company agrees to pay the amounts incurred under this insuring agreement, except settlements of claims and suits, in addition to the applicable limit of liability of this policy.

Acts of the Company or its representatives in performing the duties or exercising the rights under this agreement shall not operate to waive the Company's rights nor estop it from asserting any defense under the policy.

2. Definition of "Insured": The unqualified word "insured" wherever used in Coverage A and in other parts of this policy when applicable to Coverage A includes the named insured and, except where specifically stated to the contrary, also includes

(a) the spouse of the named insured residing in the same household as the named insured.

(b) any other person but only while using the described automobile and any person or organization legally responsible for the use thereof provided the actual use of the described automobile is with the permission of the named insured.

(c) the employer of the named insured or spouse with respect to the operation of any private passenger automobile by such named insured or spouse or by a private chauffeur or domestic servant thereof or with respect to the presence of such named insured, spouse, private chauffeur or domestic servant in any private passenger automobile.

3. Automatic Insurance for Newly Acquired Automobiles: If the named insured disposes of the described automobile and purchases or acquires title to another private passenger automobile to replace it, this policy will automatically terminate with respect to the described automobile and will automatically extend to cover the replacing automobile provided the Company is notified within thirty days of such purchase or acquisition and provided the named insured pays any additional premium that may be required because of such change upon demand.

4. Financial Responsibility Laws: Such insurance as is afforded by this policy under Coverage A (1) shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, operation, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the

Company for any payment made by the Company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

Limits of Liability

The Company's Limit of Liability Under Coverage A

1. (Liability) for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident shall not exceed \$10,000; subject to the above provision respecting each person, the total limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident shall not exceed \$20,000; and for all damages, including loss of use, arising out of injury to or destruction of property in any one accident shall not exceed \$5,000. The inclusion herein of more than one insured shall not operate to increase the limits of the Company's liability.

2. (Medical Payments) shall not exceed \$500 for all expense incurred by or on behalf of each person who sustains bodily injury including death resulting therefrom. The inclusion herein of more than one insured shall not operate to increase the limit of the Company's liability.

3. (Bail Bond Expense) shall not exceed 80% of the actual amount paid as a premium or fee for the bail bond required, but the Company shall be under no obligation to apply for or furnish such bond.

Coverage B.

4. (Comprehensive) shall not exceed the actual cash value of the described automobile, or part thereof, at the time of loss nor what it would then cost to repair or replace the described automobile or part thereof with like kind and quality with deduction for depreciation.

5. (Loss of Use) shall not exceed \$5 for any one day and subject to that limit \$150 or the actual cash value of the described automobile at the time of loss, whichever is less, for the entire period covered. The period covered shall commence seventy-two hours after the loss has been reported to the Company and to the police and terminate on the date the automobile is returned or repaired or on such earlier date as the Company makes or tenders settlement for the loss. Reimbursement shall be made only upon presentation of original rental receipts.

6. (Emergency Road Service) shall not exceed 80% of the actual amount paid for the services indicated and shall not include the cost of oil, gasoline, parts or material, or service rendered at any garage or service station.

Exclusions

This Policy Does Not Apply:

1. Under any coverage (a) to any automobile owned by the named insured or any member of the family of the named insured residing in the same household or furnished for regular use to the named insured or spouse unless such automobile is either specifically described in the Declarations or covered under Supplementary Agreement 3; or (b) when the described automobile is rented or leased;

2. Under Coverage A (1) (a) to bodily injury, sickness, disease or death of the insured or any member of the family of the insured residing in the same household as the insured or to an employee of the insured while in the course of employment in the business occupation of the insured; (b) to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law; (c) to any insured operating or employed by an automobile repair shop, public garage, sales agency, service station or public parking place with respect to the operation of any automobile other than the described automobile in the course of such business or employment; or (d) to injury to or destruction of any property being towed or transported by the insured or to any automobile used by the insured;

3. Under Coverage A (2) to bodily injury to or death of any person to or for whom benefits are

payable under any workmen's compensation law because of such injury or death, or to any person while in or upon any other vehicle not insured hereunder;

4. Under Coverages A (1), A (3) while the automobile is operated (a) by any person under the minimum age required to obtain a license to operate a private passenger automobile in the state, federal district or territory, or province in which the automobile is registered or in which the accident occurs, whichever is lower, or (b) by any person under the age of fourteen years;

5. Under Coverage B (4) to loss (a) due to war or civil war, whether or not declared, and arising out of an invasion, attempted invasion, attack or to confiscation by duly constituted governmental or civil authority; (b) due to wear and tear, freezing, mechanical or electrical breakdown or failure, negligent repair or service, or loss of tools or repair equipment, unless such loss is the direct result of a theft, covered by this policy, of the entire automobile; or (c) of tires unless loss is due to fire or theft, or unless the loss be coincident with other loss covered by this policy.

Conditions

1. Policy Period, Territory, Purposes of Use. This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of

America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

2. Definitions.

The term "described automobile" means the motor vehicle described in the Declarations and equipment usual to that type of automobile while attached thereto.

The term "Private passenger automobile" means the described automobile and any other automobile of the private passenger type including delivery sedans, panel deliveries, pick-up trucks and station wagons when such vehicles are not used for the wholesale or retail delivery of goods or merchandise.

3. Insured's Duties in Case of Loss. As a condition precedent to the enforcement of any right under this policy, the insured shall

(a) Notify the Company as soon as practicable of all accidents, claim and suits and as soon as requested fill out in detail all Proof of Loss forms required by the Company.

(b) Forward to the Company as soon as practicable every demand, notice, summons or other process received by him or his representative.

(c) Assist and Co-operate with the Company in investigating, securing and giving evidence, and in the conduct of suits and by

attending hearings and trials as well as in obtaining reasonable repairs for the damage done to the described automobile.

(d) Permit the Company to make such investigation, negotiation and settlement of any claim or suit against the insured as may be deemed expedient by the Company.

(e) Not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

(f) Subrogation. The Company shall be subrogated to all the insured's rights of recovery against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights.

4. Inspection, Repair, Replacement and Abandonment

(a) The Company shall have a reasonable opportunity to examine the automobile after loss and before repairs are started or physical evidence of damage removed but the insured shall not be prejudiced hereunder by any act on his part or in his behalf undertaken for the protection or salvage of the described automobile.

(b) It shall be optional with the Company to order the repair or replacement of the described automobile or part thereof when dam-

aged or stolen, or to pay to the insured in money the amount of the loss against which there is insurance under this policy. In the event of loss under Coverage B, the amount of the loss shall first be applied to any balance of premium owing to the Company for the policy term and the remainder shall be paid to the insured.

(c) There shall be no abandonment to the Company.

5. Action Against Company

(a) With respect to all coverages no action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed.

(b) With respect to Coverage A no action shall lie against the Company until the amount of the insured's obligation to pay shall have been finally determined either by final judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the

Company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Company of any of its obligations hereunder.

6. Other Insurance.

If, as respects the described automobile, the named insured or spouse has other insurance against loss covered by this policy, the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability of this policy bears to the total applicable limit of liability of all valid and collectible insurance against such loss;

If, as respects any private passenger automobile other than the described automobile, there exists another policy insuring the named insured or spouse against loss which is also covered by this policy, then the insurance under this policy shall be excess insurance over such other valid and collectible insurance;

If for any insured, other than the named insured or spouse, there exists other valid and collectible insurance against loss covered by this policy, such other insured shall not be covered under this policy against such loss.

7. Assignment. Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon; if, however, the named in-

sured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall cover (1) the named insured's legal representative as the named insured, and (2) under coverage A, subject otherwise to the provisions of Supplementary Agreement 2, any person having proper temporary custody of the automobile, as an insured.

8. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy signed by an executive officer of the Company.

9. Cancellation. This policy may be canceled by the named insured by mailing to the Company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the Company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the Company shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

Mutual Conditions

1. **Membership.** The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the named insured to insure one automobile for the coverages for which said fees were paid so long as this Company continues to write such coverages and the insured remains a desirable risk.

While this policy is in force the named insured is entitled to vote at all meetings of members and to share in the earnings and savings of the Company in accordance with the dividends declared by the Board of Directors on this and like policies.

2. **No Contingent Liability.** This policy is non-assessable.

3. **Annual Meetings.** The annual meeting of the members of the Company shall be held at its home office at Bloomington, Illinois, on the second Mon-

day of June at the hour of 10:00 a.m., unless the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at the address disclosed in this policy at least ten (10) days prior thereto.

In Witness Whereof, the State Farm Mutual Automobile Insurance Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois, and countersigned on the declarations page by a duly authorized agent of the Company.

/s/ R. P. MECHESELE,
President.

/s/ G. E. MECHESELE,
Secretary.

Standard Service Policy
State Farm Mutual
Automobile Insurance
Company

Home Office
Bloomington, Illinois

This Policy is Non-Assessable

With This Policy

You become a member of the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, the world's largest automobile mutual insurance company with over a million policyholders and with approximately 7000 agents and claim representatives throughout the country to service you wherever you may travel.

Read Your Policy

This State Farm Mutual Service Policy has been designed for your service and protection. It is believed to be the most modern, streamlined, up to date and yet easily understood policy of automobile insurance available to the public.

Report Every Accident

Report every accident, however slight, on the loss report enclosed with your policy for that purpose. Read carefully "insured's duties in case of loss" in policy and fill in the report according to instructions. Always secure names of disinterested witnesses. If another automobile is involved, secure its license number and the name and address of the driver. If the accident involves bodily injury telephone or telegraph the company at once.

Report New Automobiles or Change of Address

If you purchase an additional private passenger automobile which you desire to insure, notify your agent at once.

If the automobile replaces the automobile described in this policy or if you change your address, notify the Company or your agent using the form enclosed with your policy or a postcard or letter giving the same information.

Comprehensive Residence, Personal and Farm Liability

The State Farm Mutual Automobile Insurance Company has now extended its facilities and service to provide for its policyholders and members, Comprehensive Residence and Personal Liability or Comprehensive Farm and Farm Employer's Liability. Under these forms, the policyholder may insure against virtually every liability arising out of the ownership or maintenance of a home or residence, participation in sports, ownership of a dog or other pet, operation of a bicycle, carriage or cart, or arising out of the operation of a farm including the operation of agricultural equipment, straying of livestock.

These new forms are as simple to understand and yet as broad and liberal in their protection as the new automobile policies.

See Your Agent

Let him explain the advantages of these new forms.

Six Months Short Rate Table Based
on 180 Days

Periods exceeding 20 days, and not exceeding 25 days, to be the rate of 25 days, and so on up to 6 months.

1 day	4%
2 days	6%
3 days	8%
4 days	9%
5 days	10%
6 days	12%
7 days	13%
8 days	14%
9 days	16%
10 days	17%
11 days	17%
12 days	18%
13 days	18%
14 days	19%
15 days	20%— $\frac{1}{2}$ mo.
16 days	22%
17 days	23%
18 days	24%
19 days	25%
20 days	26%
25 days	28%
30 days	30%—1 mo.
35 days	33%
40 days	35%
45 days	38%

50 days	40%
55 days	45%
60 days	50%—2 mos.
65 days	53%
70 days	55%
75 days	58%
80 days	60%
85 days	65%
90 days	70%—3 mos.
105 days	75%
120 days	80%—4 mos.
135 days	85%
150 days	90%—5 mos.
165 days	95%
180 days	100%—6 mos.

General Endorsement

It is agreed that as of the effective date hereof the policy is amended in the following particulars:

In the event of loss or damage covered by the policy, the insured shall, if requested by this Company, replace the property lost or damaged, or furnish the labor and materials necessary for repairs thereto at actual cost to the insured.

Nothing herein contained shall be held to alter, vary, waive or extend any of the terms, conditions, agreements, or limitations of the undermentioned policy other than as above stated.

Effective Date August 22, 1947, 12:01 a.m. Standard Time.

Attached to and forming a part of Policy Number 72-064-ST-27 issued by the State Farm Mutual Automobile Insurance Company, of Bloomington, Illinois, to Wilbur Mehlin of Lincoln, Nebraska.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

/s/ G. E. MECHESELE,
Secretary.

/s/ R. P. MECHESELE,
President.

Countersigned at Lincoln, Nebraska, this 22nd day of August, 1947.

/s/ P. RUNTY,
Authorized Representative.

GEX4.2

141

Certified Copy

Standard Service Automobile Policy
State Farm Mutual Automobile Insurance Company
Bloomington, Illinois

Declarations

Policy No. 72-064-ST-27

Name of Insured Mehlin, Wilbur.

Address 210 No. 29th St., Lincoln, Nebraska, Lancaster Co.

Occupation Assembly Man.

Description of All Private Passenger Automobiles
Owned by Insured, Spouse or Members of
Family Residing in Household to Be Insured
Hereunder

Automobile: Make Ford, Yr. '36, Body Style 2
Door, Cyl. 8, Motor or Serial No. 2922886, Cost
350, Purchased 1-46.

Coverages: A. Loss or damage caused by any pri-
vate passenger automobile. B. Damage to or
loss of described automobile not including col-
lision.

Membership 9.00; Premium 23.70.

Term—The term of this Policy shall be from
Aug. 22, 1947, to Feb. 22, 1948, and for such suc-
ceeding terms of six months each thereafter as the
required renewal premium is paid by the insured
on or before the expiration of the current term and
accepted by the Company.

Exceptions—If any, to statements and declara-
tions following: No exceptions.

1. The automobile(s) will be principally garaged
and used in the above town, county and state.

2. No insurer has canceled or refused in writing
to issue or renew automobile insurance to the in-
sured during the past year.

3. The automobile(s) are to be used for pleasure
and business which is defined as personal pleasure
family and business use, including loading and un-
loading and including transportation of friends,
neighbors, fellow employees to and from work and
school children to and from school on a share ex-

pense, accommodation or exchange hauling basis but does not include use in the business of transporting passengers for hire as a public or livery conveyance.

4. The automobile(s) described herein is fully owned by the insured unless otherwise stated in the exceptions above. If a mortgage owner, conditional vendor or assignee, such as bank or finance company is named above, loss, if any, under Coverage B shall be payable to the named insured and to such additional interest as their interest may appear, and this insurance as to such additional interest shall not be invalidated by any act or negligence of the mortgagor or owner, nor any change in the title or ownership, nor by any error or inadvertence in the description of the automobile until after notice of cancelation of the policy or this agreement shall be given to such mortgage owner, conditional vendor, mortgagee or assignee in the same manner as required to be given to the named insured.

Date of Issue August 22, 1947.

Countersigned by

/s/ P. RUNTY.

State of Nebraska,
County of Lancaster—ss.

F. Glen Henderson being first duly sworn upon oath deposes and says he is in full charge of the issuance of insurance policies for the State Farm Mutual Auto Insurance Company in the State of

Nebraska and has carefully compared the attached copy of said policy No. 72-064-ST-27, the original of which was issued to Wilbur Mehlin on August 22, 1947, and covers the period of August 22, 1947, to February 22, 1948, and that same is a true and exact copy of the original policy with all riders or endorsements thereon.

/s/ F. GLEN HENDERSON,
Service Supt.

Subscribed and sworn to before me this 12th day of Jan., 1949.

/s/ VIRGINIA TURNER,
Notary Public.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of \$11,023.31 Dollars.

/s/ EVERETT VAN EVERY,
Foreman.

[Endorsed]: Filed January 6, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28769

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter, De-
ceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation, et
al.,

Defendants.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on January 4, 1950, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Richard Boyd, Esq., and Augustus Castro, Esq., appearing as attorneys for the plaintiff, and Edward Heavey, Esq., and Leighton Bledsoe, Esq., appearing as attorneys for the defendant, and the trial having been proceeded with on the 4th, 5th, and 6th days of January in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having

subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of \$11,023.31. Everett Van Every," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Eleven Thousand Twenty-three and 31/100 Dollars (\$11,-023.31), together with her costs herein expended taxed at \$.....

Dated: January 9, 1950.

/s/ C. W. CALBREATH,
Clerk.

[Endorsed]: Filed and entered January 9, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT AND
OF MOTION FOR NEW TRIAL

To the Plaintiff Above Named, and to Augustus
Castro, Cooley, Crowley & Gaither and Boyd,
Taylor & Reynolds, Her Attorneys:

You, and each of you, will please take notice that on Monday, the 16th day of January, 1950, at the hour of 10:00 o'clock a.m., or as soon thereafter

as counsel can be heard, or at any other time thereafter fixed by the Court, the defendant State Farm Mutual Automobile Insurance Company, by its attorneys, will move the above-entitled Court, the division thereof presided over by Honorable Herbert W. Erskine, at the courtroom of said court and division, United States Post Office Building, Seventh and Mission Streets, San Francisco, California, as follows:

I.

(1) For an order under and pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, setting aside the verdict and judgment thereon heretofore entered in the above-entitled action in favor of plaintiff and against defendant State Farm Mutual Automobile Insurance Company, and directing that said judgment be vacated and directing that judgment be entered in accordance with the motion of defendant State Farm Mutual Automobile Insurance Company for a directed verdict heretofore made. Attached hereto and marked Exhibit A and incorporated herein is the draft of the proposed order requested by this defendant.

(2) Said motion will be made upon this notice and upon all of the records, papers and files in the above-entitled action, including the transcript of the testimony, all exhibits, and the proceedings had upon the trial of the above-entitled cause.

(3) Said motion will be made on the ground that at the close of all the evidence the defendant

State Farm Mutual Automobile Insurance Company made a motion for a directed verdict, which should have been granted, but which was denied, and will be made upon all of the grounds heretofore stated as grounds for said motion for a directed verdict, and will be made upon the following grounds, and each of them:

(a) There was no evidence that the insurance policy sued on covered the judgment debtor, Duane Claggett.

(b) There was no evidence that Wilbur Mehlin, the named insured on the insurance policy, ever gave permission, express or implied, to Duane Claggett to use the automobile at the time and place of the accident involved in this case.

(c) The evidence established as matter of law that Duane Claggett, the judgment debtor, was using and driving the involved automobile at the time and place of the accident without the permission or consent of Wilbur Mehlin, either express or implied.

(d) The evidence showed as a matter of law that the declaration of principal place of use and garaging of the vehicle described in the insurance contract was violated and that such violation constituted a material breach of policy and avoided coverage at the time of the accident.

(e) That there were no acts or omissions or conduct by defendant, or by any of its agents, amounting to an estoppel as claimed by the complaint.

(f) There was no evidence of change of position

in any material respect, or at all, on the part of any plaintiff, or of plaintiff's representatives, or of the insured, in reliance on anything done by defendant, or not done by defendant, or its agents.

(g) That there is no evidence of any prejudice to any plaintiff, or to any insured, as the result of any act or conduct or failure to act on the part of defendant or its agents.

(h) There is no evidence of knowledge, actual or constructive, on the part of defendant or its agents which would be sufficient as a foundation for claiming a waiver or estoppel against defendant.

(i) There is no evidence to support a claim of waiver that is alleged in the complaint.

(j) There has been no proof of any estoppel against defendant as claimed by the complaint.

(k) No authority has been shown by the evidence in any agent of the defendant who dealt with plaintiffs or the insured, or with plaintiff's representatives, to waive any defenses under the insurance contract, or to estop the company.

(l) That no authority has been shown in any agent of the defendant to bind the insurance company on any of the matters claimed by plaintiffs to be the basis of a waiver or of an estoppel as claimed in the complaint, or as a waiver of any of the provisions of the insurance contract.

(m) That any waivers of nonwaiver provisions of the insurance contract or any estoppels that would amount to a change of terms of the insurance contract are prevented under the parol evidence rule, and no evidence has been presented to support

any waiver or estoppel with reference to the terms of the insurance contract.

(n) There was no evidence of any written endorsements on the insurance policy waiving any defenses or estopping the defendant from claiming any defenses under the policy.

(o) There was no evidence of any waiver or estoppel with reference to the declaration concerning the principal place of use and garaging of the vehicle, nor as to the violation thereof.

(p) That no extension of coverage could be established by waiver or estoppel.

(q) That no permission to use the vehicle granted by the named insured on the policy could be created or established by any waiver or estoppel.

(r) That the rights of the judgment creditor under the insurance contract became fixed and established at the time of the happening of the accident, at which time no rights existed in favor of the judgment creditors as against defendant under the insurance contract and no coverage existed at said time in favor of Duane Claggett, the judgment debtor.

(s) That there is no evidence that the defendant would have offered the sum of \$7,500, or any other sum to the plaintiffs had defendant known all of the material facts with reference to the removal of the described vehicle from the State of Nebraska.

II.

(1) Defendant State Farm Mutual Automobile Insurance Company further and in alternative will

move the above-entitled Court at the time and place hereinabove specified for an order under and pursuant to Rule 59 of the Federal Rules of Civil Procedure vacating and setting aside the verdict and judgment herein and granting to defendant State Farm Mutual Automobile Insurance Company a new trial. Attached hereto and marked Exhibit B and incorporated herein is a draft of the proposed order for new trial.

(2) Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including a transcript of the testimony and proceedings had upon the trial and the exhibits introduced in evidence, including the charge and instructions of the Court and the rulings of the Court on the instructions proposed by defendant State Farm Mutual Automobile Insurance Company.

(3) Said motion will be made upon the following grounds, and each of them:

(a) That the verdict is against the law.

(b) That the verdict is against the weight of evidence.

(c) That the verdict is contrary to the evidence.

(d) That the evidence is insufficient to sustain the verdict.

(e) Errors of law occurring at the trial and duly objected and excepted to and particularly in the giving of instructions requested by plaintiff and in the giving of general instructions by the Court, which were objected and excepted to and in the

denial of defendant State Farm Mutual Automobile Insurance Company's proposed instructions to which denial said defendant duly objected and excepted, and rulings upon the admission of evidence.

/s/ EDWIN A. HEAFEY,

/s/ LEIGHTON M. BLEDSOE,

DANA, BLEDSOE & SMITH,

Attorneys for Defendant State Farm Mutual Automobile Insurance Company.

EXHIBIT A

In the District Court of the United States, Northern
District of California, Southern Division

No. 28769-R

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter,
Deceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, THIRD DOE,

Defendants.

ORDER

Defendant State Farm Mutual Automobile Insurance Company, a corporation, having duly moved the above-entitled Court to vacate and set aside the

judgment herein heretofore rendered in favor of plaintiff and against said defendant and having moved the Court to render and enter judgment in accordance with its motion for a directed verdict heretofore made, and the matter having been heard and submitted to the Court, and the parties having appeared upon the making and hearing of said motion, and the Court being fully advised, it is hereby

Ordered, Adjudged and Decreed that the verdict and judgment herein be, and they are hereby vacated and set aside, and judgment against the plaintiff and in favor of defendant State Farm Mutual Automobile Insurance Company a corporation, be entered in accordance with defendant's motion for directed verdict heretofore made, and it is further

Ordered, Adjudged and Decreed that plaintiff take nothing herein and that defendant State Farm Mutual Automobile Insurance Company, a corporation, do have and recover its costs of suit herein.

Done in Open Court this day of, 1950.

.....

Judge of the United States
District Court.

EXHIBIT A-1

In the District Court of the United States, Northern
District of California, Southern Division

No. 28769-R

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter,
Deceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, THIRD DOE,

Defendants.

ORDER

Defendant State Farm Mutual Automobile Insur-
ance Company, a corporation, having duly moved
the above-entitled Court to vacate and set aside
the judgment herein heretofore rendered in favor
of plaintiff and against said defendant and having
moved the Court to render and enter judgment in
accordance with its motion for a directed verdict
heretofore made, and the matter having been heard
and submitted to the Court, and the parties having
appeared upon the making and hearing of said mo-
tion, and the Court being fully advised, it is hereby

Ordered, Adjudged and Decreed that the verdict
and judgment herein be, and they are hereby va-

cated and set aside, and judgment against the plaintiff and in favor of defendant State Farm Mutual Automobile Insurance Company, a corporation, be entered in accordance with defendant's motion for directed verdict heretofore made, and in the alternative it is

Ordered, Adjudged and Decreed that the verdict and judgment herein in favor of plaintiff and against defendant State Farm Mutual Automobile Insurance Company, a corporation, be and they are hereby vacated and set aside and a new trial of this action is hereby granted to defendant State Farm Mutual Automobile Insurance Company, a corporation, and it is further

Ordered, Adjudged and Decreed that plaintiff take nothing herein and that defendant State Farm Mutual Automobile Insurance Company, a corporation, do have and recover its costs of suit herein.

Done in Open Court this day of, 1950.

.....

Judge of the United States
District Court.

EXHIBIT B

In the District Court of the United States, Northern
District of California, Southern Division

No. 28769-R

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter,
Deceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, THIRD DOE,

Defendants.

ORDER

Defendant State Farm Mutual Automobile Insur-
ance Company, a corporation, having duly moved
the above-entitled Court to vacate and set aside
the verdict and judgment herein and grant to said
defendant State Farm Mutual Automobile Insur-
ance Company, a corporation, a new trial, and the
matter having been heard and submitted to the
Court, and all of the parties having appeared upon
the making and hearing of said motion, and the
Court having considered the same and being fully
advised, it is hereby

Ordered, Adjudged and Decreed that the verdict
and judgment herein in favor of plaintiff and

against defendant State Farm Mutual Automobile Insurance Company, a corporation, be and they are hereby vacated and set aside, and a new trial of this action is hereby granted to defendant State Farm Mutual Automobile Insurance Company, a corporation.

Done in Open Court this day of, 1950.

.....

Judge of the United States
District Court.

Receipt of Copy Acknowledged.

[Endorsed]: Filed January 9, 1950.

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 21st day of March, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

ORDER DENYING DEFENDANTS' MOTION
FOR JUDGMENT NOTWITHSTANDING
THE VERDICT AND DENYING MOTION
FOR NEW TRIAL

Defendant's motion for judgment notwithstanding the verdict heretofore having been tried and submitted to the Court, now, due consideration having been had, it is Ordered that said motion be denied, and that the motion for new trial be and the same is hereby denied.

In the District Court of the United States, for the
Northern District of California, Southern
Division

No. 28769-R

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter,
Deceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a Corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, and THIRD DOE,

Defendants.

Erskine, District Judge.

MEMORANDUM OPINION

Defendant has moved for judgment notwithstanding the verdict. On the instructions given to the jury, the verdict for the plaintiff can be upheld only on two possible grounds: (1) that there was permissive use, and therefore the action is within the coverage of the policy; or (2) that the defendant is estopped to deny coverage or assert the non-waiver provision of the policy, and that the jury so found such an estoppel present under the facts of the case.

It is my opinion, as I stated when the above-mentioned motion and the motion for a directed verdict were argued, that the evidence failed to

support a finding that the insured named in the policy expressly or impliedly permitted the use of the automobile covered by the policy by the person driving it at the time of the accident. Therefore the only question to be resolved by me is whether or not under the applicable law the plaintiff may raise such an estoppel against the defendant, and whether there is evidence to support a finding of such estoppel by the jury.

Although there is considerable disagreement possible as to whether the law of Nebraska or California should govern such an issue, the parties have not shown that the choice of law would produce a variance in result. No California cases squarely in point have been brought to the attention of the Court. However, the majority of courts that have passed upon this question hold that the insurer, by conduct such as defendant exhibited in this case, renders itself liable to the injured person if it has not seasonably preserved its rights by notice to the injured person that it contends that the claim for injuries does not come within the coverage of the policy, and that it undertakes to defend the insured against such claim without thereby relinquishing its objection on the ground of non-coverage. (See 130 ALR 184, and cases cited therein.) The only Nebraska case in point, *Wigington v. Ocean Acc. Corp.*, 120 Neb. 162, 231 N. W. 770, does not support the contention of the defendant; that case merely held that the facts as presented did not constitute a case of estoppel. This Court cannot hold as a matter of law that the facts in

the instant case will not support a finding of estoppel. Therefore this Court is constrained to deny the motions for judgment notwithstanding the verdict and for a new trial.

Dated: March 20th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed March 21, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Notice is hereby given that defendant The State Farm Mutual Automobile Insurance Company (a corporation) hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered of record in the office of the clerk of the above entitled court on the 9th day of January, 1950, in favor of the plaintiff and against said defendant.

Said appeal is taken from the whole of said judgment.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant The State Farm Mutual
Automobile Insurance Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 24, 1950.

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS, AND EVIDENCE
TO BE CONTAINED IN THE
RECORD ON APPEAL

Notice is hereby given that the defendant and appellant The State Farm Mutual Automobile Insurance Company (a corporation) does hereby designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in this cause:

1. Complaint.
2. Answer.
3. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received in evidence, all motions and applications made during the trial and the rulings thereon.
4. The verdict of the Jury and Judgment entered thereon.
5. Motion of Defendant The State Farm Mutual Automobile Insurance Company (a corporation) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.
6. Minute order denying motion of defendant The State Farm Mutual Automobile Insurance Company (a corporation) for Judgment Notwith-

standing the Verdict and in the Alternative for a New Trial.

7. Memorandum Opinion of the trial court filed March 21, 1950.

8. Instructions given by the Court.

9. Instructions proposed by defendant The State Farm Mutual Automobile Insurance Company (a corporation) and refused by the Court.

10. Reporter's Transcript.

11. Notice of Appeal to United States Court of Appeals for the Ninth Circuit.

12. Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

13. All other records required by the provisions of Rule 75, Subdivision (g), of the Federal Rules of Civil Procedure.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant The State Farm Mutual
Automobile Insurance Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 24, 1950.

[Title of District Court and Cause.]

NOTICE OF DENIAL OF MOTION FOR JUDG-
MENT NOTWITHSTANDING THE VER-
DICT AND IN THE ALTERNATIVE FOR
NEW TRIAL

To the Defendant, The State Farm Mutual Auto-
mobile Insurance Company, a corporation, and
to Edwin A. Heafey, and Dana, Bledsoe &
Smith, its attorneys:

You and Each of You Will Please Take Notice
that the above entitled court has denied defendant
The State Farm Automobile Insurance Company's,
a corporation, motion for judgment notwithstanding
the verdict and in the alternative for new trial.

Dated: March 24, 1950.

COOLEY, CROWLEY &
GAITHER,

By /s/ AUGUSTUS CASTRO,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 24, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28769

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter, de-
ceased,

Plaintiff,

vs.

THE STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, a corporation,
WILBUR M. MEHLIN, FIRST DOE, SEC-
OND DOE, THIRD DOE,

Defendants.

Before: Hon. Herbert W. Erskine,
Judge.

REPORTER'S TRANSCRIPT

January 4, 5 and 6, 1950

Appearances:

For the Plaintiff:

COOLEY, CROWLEY & GAITHER, by
RICHARD A. BOYD, ESQ., and
AUGUSTUS CASTRO, ESQ.

For the Defendants:

DANA, BLEDSOE & SMITH, by
EDWIN A. HEAFEY, ESQ., and
LEIGHTON M. BLEDSOE, ESQ.

(A jury was duly impaneled and sworn and the following proceedings were had.)

January 4, 1950, 10:00 a.m.

(Opening statement by Mr. Boyd on behalf of plaintiff.)

(Opening statement by Mr. Heafey on behalf of defendants.)

Mr. Boyd: At this time, your Honor please, I would like to offer into evidence a photostatic copy of the insurance policy. A copy has been attached to the original answer and served on us. Like to offer, if the Court please, as plaintiff's exhibit 1, being the certified copy of the insurance policy covering this automobile.

The Court: No objection to that, is there?

Mr. Heafey: No, your Honor.

The Clerk: Plaintiff's exhibit 1 in evidence.

(Whereupon certified copy of insurance policy was received in evidence and marked plaintiff's exhibit 1.)

PLAINTIFF'S EXHIBIT No. 1

[Plaintiff's Exhibit No. 1 is identical to Exhibit A attached to the Complaint. See pages 30 to 53 of this printed record.]

[Endorsed]: Filed Jan. 4, 1949.

Mr. Boyd: Now at this time, if your Honor please, there are certain pertinent parts of this

policy that I would like to read to the jury.

This policy, ladies and gentlemen, was issued on August 22 of 1947 and ran for a period of six months up to February 22 of 1948, for a premium of \$32.70, issued to the name of the insured, Wilbur Mehlin, 210 North 29th Street, Lincoln, Nebraska. Included in the policy under coverage A is the provision, "Defense, settlement, supplementary payments: As respects such insurance as is afforded by the other terms of [2*] "this policy (a) under coverage A (1) the company shall

1. Defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;"

The policy also covers, in addition to the named insured, Wilbur Mehlin, under supplementary agreements:

"2. Definition of 'insured': The unqualified word 'insured' wherever used in coverage A and in other parts of this policy when applicable to coverage A includes the names insured and, except where specifically stated to the contrary also includes

"(a) The spouse of the named insured residing in the same household as the named insured."

“(b) Any other person, but only while using the described automobile and any person or organization legally responsible for the use thereof, provided the actual use of the described automobile is with the permission of the named insured.”

This policy also provides under condition 1: [3]

“Policy. Territory, purposes of use. This policy applies only to accidents which occur and to direct accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, [3-a] its territories, possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.”

Declaration 3 as to the purposes of use is as follows:

“The automobile is to be used for pleasure and business which is defined as personal pleasure, family and business use, including loading and unloading and including transportation of friends, neighbors, fellow employees to and from work and school children to and from school on a share expense, accommodation or exchange hauling basis but does not include use in the business of transporting passengers for hire as a public or livery conveyance.”

The limits of liability under this policy are provided under coverage A:

“The Company’s limit of liability under coverage A:

“1. (Liability) for all damages including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident shall not exceed \$10,000;”

Now, if your Honor please, at this time there are certain [4] admissions that have been made to the pleadings that I would like to read into evidence to simplify the proof that is required of the plaintiff, if I may.

The Court: All right, proceed.

Mr. Boyd: Counsel, in the original complaint in the first cause of action, paragraph 1a is admitted. That is, it is admitted by the answer filed by the defendants, ladies and gentlemen.

“The defendant, the State Farm Mutual Automobile Insurance Company (hereinafter referred to as ‘Company’), was and now is a corporation duly organized and existing according to the laws of the State of Illinois and authorized to conduct and were and still are conducting an automobile insurance business in the city of Berkeley, County of Alameda, State of California;

“(d) That the amount in controversy herein, inclusive of costs and interests, exceeds the sum of \$3000;

“(e) That on the 12th day of July, 1948, the

Superior Court of the State of California in and for the County of Contra Costa duly made and entered its order appointing Bertha Lee Porter special administratrix of the estate of Charles E. Porter, deceased.”

Paragraph 4; counsel, on page 3, lines 12 down to the first three words of line 18: [5]

“That thereafter on or about the 19th day of December, 1947, plaintiff instituted an action against said Claggett to recover damages for the death of said Charles E. Porter and thereafter on the 29th day of September, 1948, judgment was rendered in said action in favor of the plaintiff and against said Claggett for the sum of \$30,000 and costs of suit, which were taxed at the sum of \$121.74 . . .”

Paragraph 5 counsel, following:

“That said ‘Mehlin’ have performed all the terms and conditions upon their part to be performed under said standard service automobile policy.”

Now, in the answer, counsel, page 7, lines 14 to 18. This is the answer, ladies and gentlemen, of the defendant, the State Farm Mutual Insurance Company.

“Answering the following allegations of paragraph 3 of the second alleged cause of action of said complaint:

“ ‘On the 17th day of February, 1948, Dana, Bledsoe & Smith, as attorneys for said “Company” prepared an Answer to such complaint

on behalf of said defendant Claggett, in which it was admitted that Claggett was driving said Form with the permission of "Mehlin" and Paul C. Dana, of the firm of Dana, Bledsoe and Smith, verified such answer on behalf of said Claggett;' [6]

"Defendant admits said allegations;"

Mr. Heafey: I think, your Honor, that the rest of that allegation and the answer should be read because it is in connection with this and explains the admission, just reading an extract from the answer without reading the entire denial or admission.

The Court: I would suggest that you read the entire denial.

Mr. Boyd: Read the entire——?

The Court: That particular denial.

Mr. Boyd: Then he goes on:

"and, in this connection,"
following that?

Mr. Heafey: Yes.

Mr. Boyd: "and, in this connection, alleges that at the time said answer was prepared and filed neither defendant nor its attorneys, had any information or knowledge concerning the circumstances of the removal of the said Ford automobile from the State of Nebraska to the State of California,"

That sufficient?

Mr. Heafey: No.

Mr. Boyd: I think that is a matter of defense, if your Honor please.

The Court: Yes, I think that is enough. [7]

Mr. Boyd: Then, on page 6, counsel, of the complaint, lines 1 to 4. This is an allegation that was also admitted by the company, ladies and gentlemen.

“but thereafter said defendant ‘Company’ employed the law firm of Dana, Bledsoe & Smith to defend said Claggett pursuant to the terms of said policy.”

And then on page 7, counsel, lines 14 to 16; also admitted by the defendant insurance company:

“and said defendant ‘Company’ has paid said Dana, Bledsoe & Smith in full for their services as attorneys for said Claggett under said policy;”

At this time, if your Honor please, I would like to call Mr. Castro to the stand.

AUGUSTUS CASTRO

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court, please?

A. Augustus Castro.

Direct Examination

By Mr. Boyd:

Q. What is your business or profession, sir?

A. I am an attorney at law, have been since 1936, admitted to all the courts in the State of California, including this Federal Court.

Q. And with whom, with what firm were you

(Testimony of Augustus Castro.)

associated in October of 1947, and at the present time? [8]

A. With the law firm of Cooley, Crowley & Gaither.

Q. Are you acquainted with the plaintiff in *his* action, Bertha Lee Porter? A. I am.

Q. And when did you first have contact with her, Mr. Castro?

A. First met Mrs. Porter about the early part of November of 1947 when she came to our office concerning the death of her husband.

Q. And following that contact, were any agreements reached, or did you represent her in this action? A. Yes, we did.

Q. And following your employment as attorney for Mrs. Porter, what was the first thing that you did in her behalf?

A. On November 10, 1947, we wrote a letter to the State Farm Mutual Automobile Insurance Company at 2054 University Avenue, Berkeley, California, concerning the death of her husband on October 31, 1947.

Q. Will you just read that letter, please?

A. This is a copy——

Mr. Heafey: Your Honor please, I would like to have counsel advise what is the purpose of his testimony.

Mr. Boyd: Based on the second cause of action, your Honor please, waiver and estoppel.

Mr. Heafey: Waiver and estoppel?

Mr. Boyd: Defense they may have. [9]

(Testimony of Augustus Castro.)

The Court: Yes, I thought it was intended to prove, attempt to prove those allegations for estoppel.

The Witness: That may be the original, Mr. Boyd. All I have is an office copy of that letter.

Mr. Boyd: I don't think there would be any question of reading it.

The Witness: Dated November 10, 1947, addressed to the State Farm.

"In re: Charles Lee Porter, deceased. Accident October 31, 1947.

"Dear Mr. Myers:

"We write to advise you that this office represents Mrs. Bertha Lee Porter, widow, and the two babies of Charles Lee Porter, who died November 1, 1947, from injuries sustained on October 31, 1947, in Richmond, when he was run down by D. R. Claggett, the driver of the automobile insured by your company.

"Without the delay and expense of litigation, this may be a case for amicable adjustment, subject of course to the approval of Mrs. Porter, and the Court's approval on behalf of the two infants.

"At your early convenience, we will be happy to discuss the matter, either with you personally or with any of your assistants.

"With best personal regards and thanking you for [10] your usual kind attention hereto,

"Very truly yours,

"COOLEY, CROWLEY &
GAITHER."

(Testimony of Augustus Castro.)

I believe the original was signed by Mr. Louis V. Crowley.

Q. Did you receive a reply to that letter?

A. Yes, we did.

Q. Would you read the reply, please, and the date?

A. November 14, 1947, on the letterhead of the State Farm Insurance Company, the following was written:

“November 14, 1947, to Cooley, Crowley & Gaither, 333 Montgomery Street, San Francisco 4, California. Attention: Louis V. Crowley.

“Gentlemen: In re: Charles Lee Porter, deceased. Accident October 31, 1947. Miscellaneous File 347.

“We have yours of November 10, advising of a claim being made against a party by the name of D. R. Claggett whose automobile, on October 31 of this year collided with Charles Lee Porter resulting in his death.

“A careful check has been made of our records, but we are unable to find a policy issued to Mr. Claggett. However, if you have any other information kindly advise us accordingly so that we may again review our records.

“Yours very truly,

“G. E. MYERS,

“Claims Manager.” [11]

Q. Subsequent to that date did you have any

(Testimony of Augustus Castro.)

conversations with any representatives or adjustors of the State Farm Mutual Automobile Insurance Company? A. Yes.

Q. What was the date of the first conversation that you had with them?

A. The first conversation occurred about December 3, 1947, with a man by the name of John Dennis.

Q. Where did that conversation take place?

A. That was a telephone conversation in reply to a call from Mr. Dennis.

Q. And what was that conversation?

A. In that conversation Mr. Dennis stated that there was insurance on the automobile which had caused the death of Mr. Porter and that they had been in error in previously reporting to us that there was no insurance covering the automobile.

Q. Did you have any subsequent conversations with any representative of the State Farm Mutual Insurance Company? A. Yes, I did.

Q. What was the next conversation?

A. On December 31, 1947, a man by the name of Louie Gripenstraw gave me a card, claim adjustor, State Farm Mutual Automobile Insurance Company, Bloomington, Illinois, phone Thornwall 3-2100, 2054 University Avenue, Berkeley 4, California.

Q. What was the conversation with Mr. Gripenstraw? [12]

A Mr. Gripenstraw called to our office and told

(Testimony of Augustus Castro.)

me that he was representing the State Farm and handed me his card. He told me that they had an insurance policy covering this automobile and that they were interested in seeing if the case could be settled. I told him we were likewise interested in settlement of the case. But before I would give him any figure I wanted to know what they would pay or what their policy limits were. He stated that he wasn't permitted under the rules of the company to give me the policy limits. I told him that we had information that indicated the policy limit was \$10,000. He said he would tell me that the policy limits did not exceed that. And then I asked whether the policy limits were only \$5,000. He said no, more than five. So I said that leaves the conclusion that you have a policy covering this in the sum of \$10,000. He says, "All I can say: it is no more or no less than that."

So then I said it looks to me like a case where you should pay the policy limits. As far as I can see there is no question but what the man was liable for striking Mr. Porter and we would like to see you pay the policy limits here and if you save anything on the policy limits you will be doing well.

He says, "Well, the company won't do that." I said, "Why not?" He said, "We may have a defense to the case." "Well, what is the defense? The only issues that are involved in the case are negligence and permission to use the automobile." I said, "We know the negligence is clear; any

(Testimony of Augustus Castro.)

question about the permission?" He said, "No, there isn't." He says, "We are satisfied that Mrs. Mehlin had the permission to bring the automobile out here and that Mr. Claggett had her permission to use it."

And then he submitted me a figure of \$7,500 on the \$10,000 policy and I told him I would advise Mrs. Porter, who was at that time living in Huntington Park, California, of the offer and on January 5, 1948, I wrote to her concerning the offer.

Q. Was there any subsequent conversations with any representatives of the State Farm Mutual?

A. After this meeting with Mr. Gripenstraw I had another telephone conversation with him in which I told him Mrs. Porter would not accept the sum of \$7,500 but would again ask for the policy limits. And he said they had no authority to pay the policy limits in California, but would have to contact their office back at Bloomington, as the policy was issued there and then a board would pass on it as to what they would pay.

He later called me and said—telephoned again and said they would not increase the offer over \$7,500. Then we filed suit against Mr. and Mrs. Mehlin and against Mr. Claggett and had the summons and complaints served on Mr. Claggett. Mrs. Mehlin at that time had returned to Lincoln, Nebraska, and Mr. Mehlin was likewise, as far as we knew, in Lincoln, Nebraska. [14]

After the service of the summons on Mr. Mehlin,

(Testimony of Augustus Castro.)

we were again contacted by the State Farm people.

Mr. Heafey: Did I understand you to say that he served a summons on Mr. Mehlin?

The Witness: Mr. Claggett.

The Court: You said "Mehlin."

The Witness: I am sorry, your Honor. May I correct the record? The date of my second conversation, of my two conversations with Mr. Gripenstraw following his visit at my office, were on January 13, 1948, and January 22, 1948. Then on January 28, 1948, I was contacted by a Mr. Hunt, who stated that he was—by telephone—who stated that he was representing the State Farm Mutual Automobile Insurance Company and that they were again interested in, before turning over the summons and complaint, to have a settlement made, and they wanted to save the expense of turning it over to attorneys to defend.

I again told him that we had asked for the policy limits and that they had offered \$7,500, that \$7,500 was not acceptable. He said that as far as he was concerned in a case of this kind that they paid up to the sum of \$8,500 where they had a policy limit of \$10,000. In an exceptional case they would pay \$9,000, but his authority at that time was limited to \$7,500 and would I submit a proposal in the neighborhood of \$9,000 to \$8,500, and I told him I would contact Mrs. Porter by letter, and our conversations concluded there. [15]

And I contacted Mrs. Porter by letter and after

(Testimony of Augustus Castro.)

talking to—receiving a reply from her, I again talked to Mr. Hunt. Mr. Hunt had called our office on or about the 5th day of February, 1948, and left his number as Thornwall 3-2100, and in response to that telephone message I called Mr. Hunt and Mr.—I had told Mr. Hunt that Mrs. Porter would accept the sum of \$9,750. He rejected that offer stating again that they would not go over the sum of \$8,500, unless an exceptional case, and in that event only go to \$9,000, but he still would not offer \$8,500 or \$9,000 and I said, look, then, they better turn it over to their attorneys, because we would have the matter tried.

Q. Did you have any subsequent conversations with any representatives of the State Farm Mutual Automobile Insurance Company concerning the representation of Mr. Claggett?

A. I believe that within a day or two after that conversation on February 5, 1948, Mr. Hunt called me and stated their attorneys were Dana, Bledsoe & Smith, and that he was going to turn the file over to them and would I grant him an extension of time in which to appear for Mr. Claggett, and I said that I would and I believe there was a formal stipulation signed protecting their time within which to appear in the action.

The Court: It is now 12 o'clock, gentlemen. We will now adjourn until 2 o'clock this afternoon. And during the adjournment, ladies and gentlemen, bear in mind the admonition I have [16] heretofore given you.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [16-a]

January 4, 1950, 2:00 P.M.

AUGUSTUS CASTRO

resumed the stand.

Direction Examination
(Continued)

By Mr. Boyd:

Mr. Boyd: May I proceed, Your Honor? Mr. Castro.

Q. Mr. Castro, following the granting of the extension of time in which to plead, did you have any communications or conversations with the firm of Dana, Bledsoe & Smith, the attorneys for the State Farm?

A. They filed a formal answer in the action, which was the only communication I had until some time after that answer had been filed.

Q. Was anything said in that answer as to the use of the automobile?

A. Yes, there was. Reading from a copy of their answer, which was served on us in our office, page 2, paragraph 3, line 8, they answered as follows. This was the answer which was sworn to by Mr. Dana, acting as attorney for Mr. Claggett, and he swore to it on the grounds that Mr. Claggett was absent from the county and he stated that the same is true of his knowledge, except those matters he states on information and belief.

(Testimony of Augustus Castro.)

In paragraph 3 of the answer he alleges, "Answering the allegations of paragraph 3, defendant admits that South 47th Street and Access Highway were and are the intersecting public streets, in the City of Richmond, County of Contra Costa, [17] State of California, that the defendant, Wilbur M. Mehlin, was the owner of the therein described Ford automobile and that this answering defendant was driving said automobile with his consent and permission and with these exceptions, defendant denies each and every and all and generally and especially, the allegations of paragraph 3 of the complaint;" and in paragraph 3 of the complaint we had alleged that plaintiffs are informed and believe and upon such information and belief allege that said defendant, Wilbur M. Mehlin and certain other people were the owners and entitled to the possession of the Ford automobile hereinafter mentioned, and that he was, said defendant, Duane R. Claggett, was driving and operating said automobile with permission of said defendants and Mr. Dana's answer to that paragraph admitted the permission.

Mr. Heafey: May we have the date of that answer, please?

The Witness: That answer is verified February 17, 1948.

Q. (By Mr. Boyd): Now, Mr. Castro, following the receipt of the answer that you have just referred to, what, if anything, was done with this lawsuit?

(Testimony of Augustus Castro.)

A. There was no investigation made after the filing of that answer concerning the permissive use since the company representative, Mr. Gripinstraw, had informed me that there was proper permission and Mr. Dana stated in his answer under oath that there was permission. We relied on representation of Mr. Gripinstraw, and a sworn statement of Mr. Dana concerning [18] permissive use and made no investigation concerning it.

Q. Was either Mr. Mehlin or his wife ever served with a copy of this summons and complaint?

A. No, neither one was served; as long as Claggett had permission to use the vehicle, there would be nothing gained to bring in either Mr. or Mrs. Mehlin.

Q. Now, Mr. Castro, did you have any further conversations with any of the representatives of Dana, Bledsoe & Smith, following the filing of the answer that you have referred to?

A. Yes, we filed a memorandum to set the case for trial on February 25, 1948, and that was served on Mr. Dana's office and after it was served, Mr. Dana, one of the members of his office—I have forgotten who it was, I believe it was his secretary—called me and said Mr. Dana would like to stipulate as to a trial date and that they thought the 6th of July, 1948, would be satisfactory, and it was learned that the 6th was a regular law and motion day because of the 4th of July holiday, so a formal stipulation was prepared by Dana, Bledsoe & Smith

(Testimony of Augustus Castro.)

in writing, setting the case for trial on the 12th day —on the 7th day of July, 1948, and that stipulation was dated March 12, 1948.

Q. And who did Dana, Bledsoe & Smith appear for on that stipulation setting the case for trial?

A. Duane R. Claggett.

Q. Now, did you have any conversations with any members of the [19] firm following the stipulation for the day certain for trial?

A. Yes, on two occasions between March 9 and the date of the trial, I would place the occasions about a week or ten days before July 7, 1948, Mr. Dana called me on the telephone concerning the case and he stated first that he wanted a continuance as he didn't think he would be able to try it and second, that he thought it was a case which he should settle and if we would consent to the continuance he thought he could work out a settlement with the company, and that was about a week to ten days before the trial of July 7, and I believe three or four days before that trial he again called and requested a continuance and I refused the continuance and he again made the statement concerning the settlement of the case if he could get a continuance.

Then, the Friday or Saturday before the trial, which was about the 2nd or 1st or 2nd of July, Mr. Bledsoe called and stated he was going to take over the file and handle the trial as Mr. Dana couldn't try it and then on the morning, or some

(Testimony of Augustus Castro.)

time during the day of July 6, the day before the case was set for trial, Mr. Bledsoe advised me he was going to have to move for a continuance on the grounds he would not be able to bring Mr. Claggett out from Minnesota, or one of the mid-western states, for the trial on July 7.

And on the morning of July 7 we appeared at Martinez and Mr. Bledsoe was there and Mrs. Porter was there and Mr. Bledsoe [20] at that time filed a formal motion for a continuance and the court granted the continuance upon the condition that the defendant, and upon the stipulation by Mr. Bledsoe, that they would pay the expenses of the transportation of Mrs. Porter from her home at Huntington Park to Martinez, the court expenses such as the bringing in of the jury that morning, the mileage, and two or three witnesses, I believe, which we had subpoenaed for trial to be there that morning, and Mr. Bledsoe stated to his Honor, I believe it was Judge Patterson, that he would see that those costs were paid on behalf of the defendant Claggett, and the continuance was granted to the 14th of July, 1948.

After we had left the Judge's chambers, Mr. Bledsoe stated to me that he had reviewed the file and there couldn't be any settlement of it because he had found out there was a question of permissive use involved and the company had not secured any reservation of rights up to that time and he didn't know what he could do about it because it looked

(Testimony of Augustus Castro.)

too late for him to obtain a reservation of rights, but going to get one when Mr. Claggett appeared for the trial on the 14th of July.

And that is the last conversation that I had with him up to the time of trial on the 14th of July.

Q. Was any formal answer filed subsequent to February 17 of 1948?

A. Yes, on the morning of July 17. Mr. Bledsoe——

Q. July 17?

A. I mean July 7. Mr. Bledsoe also made a motion to file an [21] amended answer. And in that amended answer he eliminated the allegation of his earlier answer where he had admitted that Mr. Mehlin had consented to the use of the automobile by Claggett and merely admitted that the automobile was being driven with the permission of Mrs. Claggett and——

Q. Mrs.——

A. Mrs. Mehlin, and he did it on page 1 of his amendment to answer of Duane R. Claggett as follows. Reading from line 29:

“That the defendant Wilbur M. Mehlin was the owner of the therein-described Ford automobile and that this answering defendant was driving said automobile with the consent and permission of Mrs. Wilbur M. Mehlin and that these exceptions and

(Testimony of Augustus Castro.)

denies each and every and all and single, generally and specifically the allegations of paragraph 3.”

Mr. Bledsoe swore to that answer on behalf of Mr. Claggett on July 6, 1948, before a notary public named Marie H. Stanley, in and for the City and County of San Francisco.

Q. Was the case tried on July 14?

A. The case was tried before Judge Patterson on July 14.

Q. Who represented Duane R. Claggett in the trial of the action filed by Bertha Lee Porter against the driver of the automobile, Duane R. Claggett?

A. Mr. Leighton Bledsoe.

Q. Of the firm of Dana, Bledsoe & Smith? [22]

A. Yes.

Q. Following the trial of that action were there any subsequent motions made?

A. There were formal findings and conclusions of law requested by the defendant Duane R. Claggett through Mr. Bledsoe and when we proposed certain findings he resisted them and proposed findings of fact and the court, I believe, set the matter down for hearing, and Mr. Bledsoe appeared on the hearing, and I appeared for Mrs. Porter and the court settled the findings of fact.

Q. Was there subsequent proceedings, settlement of findings of fact?

A. After the findings of fact and the formal judgment was signed in September, Mr. Bledsoe filed a notice of intention to move for a new trial on behalf of the defendant Claggett and thereafter

(Testimony of Augustus Castro.)

that motion was set down for hearing before Judge Patterson and Mr. Bledsoe appeared for Claggett, I appeared for Mrs. Porter, and the motion argued and denied.

Q. What was the date of the denial of the motion for a new trial?

A. I believe approximately October 5.

Q. Has there been any payment of any kind of the judgment of \$30,000 interest and costs that has been received by Mrs. Porter?

A. No payment in any amount. [23]

Q. Following the denial of the motion for new trial, did you receive any communications from the law firm of Dana, Bledsoe & Smith concerning the payment of the judgment?

A. Yes, we did. I believe towards the end of October, 1948, Mr. Bledsoe wrote a letter to our firm to my attention.

Q. Would you read that letter to the jury, please?

A. On the letterhead of Dana, Bledsoe, & Smith, law offices, 440 Montgomery Street, San Francisco, October 25, 1948.

“Cooley, Crowley & Gaither,

“333 Montgomery Street,

“San Francisco

“Attention: Mr. Castro

“Re: Porter vs. Claggett.

“Gentlemen:

“So that you may be advised of our position with

(Testimony of Augustus Castro.)

reference to the above-entitled case, we wish to state that we have notified Claggett that no further proceedings will be taken by us as attorneys for the State Farm Mutual Insurance Company in the above-entitled action. We have notified him as of today and on previous occasions, that the State Farm Insurance Company does not recognize any liability to him under its policy issued to Wilbur Mehlin. We have also told him that the insurance company will not pay any judgment on the above-entitled case, but will stand on its position that there was and is no coverage for Claggett on account of the accident involved. [24] We have notified Claggett that he can secure other counsel if he so desires for the purpose of taking an appeal. We doubt that he will do this because we gave him similar information and advice in August of this year and got no response from him.

“Very truly yours,

“DANA, BLEDSOE & SMITH,

“By LEIGHTON M. BLEDSOE.”

Q. Was any appeal taken from that judge?

A. Not to my knowledge.

Mr. Boyd: You may cross-examine.

Cross-Examination

By Mr. Heafey:

Q. Mr. Castro, you mentioned the fact that some time in July, I believe it was the early part of July or around July 7, that a motion was made for a continuance in this case? A. Yes.

(Testimony of Augustus Castro.)

Q. Was that on July 7?

A. I believe it was the morning of July 7.

Q. And at that time was a motion made for continuance of the trial date? A. Yes.

Q. And also a motion to file an amended answer?

A. Yes.

Q. Now, in support of that motion to file an amended answer, [25] was an affidavit filed?

A. Yes.

Q. And whose affidavit was that?

A. I believe it was Paul C. Dana.

Q. Have you a copy of that affidavit?

A. Yes.

Q. That was the affidavit containing the facts which supported the motion for leave to amend the answer, did it not?

A. It contained a statement by Mr. Dana which attempted to justify the amendment.

Q. Yes. Now, will you kindly read the affidavit to the jury, please, that was filed at that time?

Mr. Boyd: Your Honor please, that is objected to as a self-serving declaration by the representatives of the State Farm Mutual Insurance Company as to why they wanted to make any amendment to the—the fact that the amendment was made, I think, is the ultimate fact that is admissible.

The Court: It may have some bearing on this question of estoppel.

Mr. Heafey: Yes, your Honor.

The Court: I will allow it. It will come in, anyway.

(Testimony of Augustus Castro.)

Mr. Boyd: Very well, your Honor.

The Witness: I think we should have the right to cross-examine, your Honor. We are deprived of cross-examination if the affidavit is put into evidence. [26]

The Court: This is the affidavit in support of a motion to amend the answer?

Mr. Heafey: That is right.

Mr. Boyd: Yes, your Honor, made by an attorney who is not present in court and merely a self-serving declaration as to their reasons as to why they asked permission from the Court to amend the answer originally filed. The fact is that the answer was amended as set out in the plaintiff's testimony, but the idea is we are deprived of a right of cross-examination and the affidavit itself as set forth in the answer is entirely self-serving and I don't feel it should be read in the evidence as we know nothing about the contents thereof.

The Court: Mr. Dana is available?

Mr. Heafey: No, your Honor, Mr. Dana is out of town, ill; advised by his doctor to go away and stay away until the 1st of February. But they brought out the fact that this motion was made. The motion was granted, read the amended answer, the amended allegations in the answer, and I think we are entitled to show by the affidavit the basis for that.

The Court: I will allow it to be read. I feel the claim of estoppel here may be relevant.

(Testimony of Augustus Castro.)

Mr. Heafey: Very well, your Honor.

Q. If you haven't that, Mr. Castro, I will show you what purports to be a copy and maybe you can identify it.

A. I am pretty sure it is in the file. Let me check here. [27] Entitled: "State of California, City and County of San Francisco. Paul C. Dana, being duly sworn, deposes and says:

"That he is an attorney licensed to practice in the states of California"—

Mr. Heafey: "In the courts."

A. "In the courts of the State of California; that he is a member of the firm of Dana, Bledsoe & Smith, attorneys for defendant Duane R. Claggett in the above-entitled action; that he is the attorney to whom this case was assigned for handling; that he prepared and verified the answer of Duane R. Claggett in February, 1948; that at said time the file on said action then in affiant's possession indicated that the automobile driven by said defendant at the time of the accident was owned by Wilbur Marvin Mehlin and that it was being driven by defendant Claggett with the consent of Mehlin's wife at the time of the accident; that the circumstances of how the wife had possession, or of how she was empowered to give permission for the use of said automobile were not then revealed in affiant's file; that affiant prepared the answer upon information contained in the file and for that reason admitted that the automobile was being driven with the consent of the defendant Wilbur M. Mehlin;

(Testimony of Augustus Castro.)

that affiant had not [28] consulted defendant Claggett before preparing and signing said answer; that affiant is informed and believes and upon such information and belief alleges that defendant Claggett can only say that he was driving the car with the permission of Mrs. Mehlin; that shortly after April 19, 1948, affiant received a letter from attorneys Ginsburg & Ginsburg of Lincoln, Nebraska, advising affiant that they were attorneys for defendant Wilbur Mehlin and setting forth the following information:"

Excuse me. If your Honor please, at this time the affidavit goes on to quote a letter from attorneys purportedly representing the Mehlin in Lincoln, Nebraska, as to certain information that they are assumed to have had that they communicated to Mr. Dana, who has made this affidavit and contains that letter. It seems to me——

Mr. Heafey: Which is the first information, your Honor, that anyone had concerning the case.

The Court: Statements made in the letter about facts are hearsay and shouldn't be binding on the plaintiff.

Mr. Heafey: No.

The Court: Maybe it should be stipulated that there was a letter of that character that came in at that time, disclosed the fact, if it were a fact, that——

Mr. Heafey: Mrs. Mehlin. [29]

The Court: ——Mrs. Mehlin was the only one

(Testimony of Augustus Castro.)

who authorized the use of the car. Can't you make a statement from that affidavit to the effect that it proceeds to state that he received a letter which gave him notice that they claimed the facts to be otherwise, and the answer, the original answer——

Mr. Heafey: Yes.

Mr. Boyd: We will stipulate to that, but the contents of the letter itself is what we object to.

Mr. Heafey: We will stipulate to that, too, your Honor.

The Witness: Would it be proper, your Honor, at this time to ask for a stipulation as to what investigation the State Farm had made up to the time the answer was filed concerning permissive use?

Mr. Heafey: That is a matter of cross-examination. We are putting on our case.

The Court: I think so; the presumption is——

The Witness: That is one of the problems which we would cross-examine Mr. Dana about. We are not going to have that opportunity.

The Court: Well, you have a sense of presumption that they made an investigation.

Mr. Heafey: And the rest of the affidavit is admissible, your Honor?

The Witness: Reading from lines 24:

“That affiant is informed and believes and upon such information and belief alleges the fact to be that no service of process has been made in this case upon defendant Wilbur M. Mehlin nor upon his wife;

(Testimony of Augustus Castro.)

“That following receipt of the foregoing letter affiant caused an investigation to be made into the legal aspects of the alleged permissive use of the automobile in question; that the law of Nebraska will be involved; that one of affiant’s associates has examined the law of California and reported thereon to affiant, but the law of Nebraska has not yet been ascertained by affiant; that it may become important to the other defendants named in this case and not yet served as to whether defendant Claggett had permission of defendant Wilbur M. Mehlin to use the automobile at the time and place of the accident; that affiant expects to be asked to represent the defendant Wilbur M. Mehlin in this action when or if said defendant is served with process therein;

“That affiant now believes that the admission made in the answer of defendant Claggett to the effect that said Claggett was driving the automobile with the consent and permission of defendant Wilbur M. Mehlin is untrue, incorrect, and in error; that defendant Claggett can only admit that he was driving said automobile with the permission and consent of [31] Mrs. Mehlin; that the ends of justice and the interests of truth require that said answer be amended for the purpose of changing the admission made by the defendant Claggett to the limited effect that said automobile involved in the accident was owned by Wilbur M. Mehlin and was being driven at the time of the accident in question

(Testimony of Augustus Castro.)

by defendant Duane R. Claggett with the consent and permission of Mrs. Wilbur M. Mehlin.

“Wherefore, affiant prays for leave to amend the answer of defendant Claggett as herein indicated.

“/s/ PAUL C. DANA.

“Subscribed and sworn to before me this 6th day of July, 1948.

“[Seal] MARIE H. STANLEY,

“Notary Public in and for the City and County of San Francisco, State of California.”

Q. Is that the 6th day or 2nd day?

A. 6th written **here**.

Mr. Heafey: That is all.

Mr. Boyd: No further questions.

(Witness excused.)

Mr. Boyd: At this time, your Honor please, I would like to read one additional paragraph of the insurance policy into evidence:

“Supplementary agreements—2. As respects such insurance as is afforded by the other terms of this policy the company shall pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, or premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid,

tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;"

If your Honor please, at this time the plaintiff rests.

Mr. Heafey: We have a motion we want to make at this time, your Honor. This motion is liable to take some time to argue. I am sure of that, so that maybe your Honor would want the jury to come back tomorrow morning.

The Court: Ladies and gentlemen, you will be excused for the remainder of the afternoon. You will return here again at 10 o'clock tomorrow morning and during the time that you are away, please bear in mind the admonition I have heretofore given you. You are to leave now.

(Jury excused.) [33]

The Court: Proceed.

Mr. Bledsoe: At this time the defendant moves for a judgment of dismissal on the following grounds: One, that there has been no evidence that the operator of the automobile, Claggett was operating it with the permission, either express or implied, of the named insured, Wilbur Mehlni; that the evidence does not show any knowledge of the defendant or any of its authorized agents of any facts which would warrant a finding of a waiver or of an estoppel; that there is no evidence of any

waiver on the part of the insurance company or of any of its authorized agents with reference to the lack of coverage in the case; that there is no evidence that the plaintiff in this action, or plaintiffs in this action, have been prejudiced or their positions prejudiced with reference to any representations or statements or acts of the insurance company or of any of its agents; that there is no evidence of any estoppel against the insurance company; that there is no evidence of any authority on behalf of any of the persons speaking on behalf of the insurance company to waive any provisions of the policy or to bind the company with reference to their statements. And there is no evidence that the policy extends coverage to the person against whom the judgment was obtained, namely, Duane R. Claggett, and that as a matter of law the coverage of the insurance policy cannot be extended to make it cover something that it does not cover by any acts or conduct which would amount [34] to a waiver or an estoppel.

(Thereupon argument was made by Mr. Bledsoe on the motion for a judgment of dismissal.)

(Argument by Mr. Castro on behalf of the plaintiff.)

(Whereupon the Court made the following ruling:)

The Court: I am not familiar enough with these authorities that you have cited. I would like to

look those over during the interim between now and tomorrow morning and then advise you of my ruling on the second count, but I think I will have to deny the motion as to the first count at this time.

Suppose you gentlemen get here about ten minutes of ten so that I can just tell you what the ruling is without telling it in front of the jury.

Mr. Heafey: Yes, your Honor.

The Court: Recess until 10 o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10:00 o'clock a.m., Thursday, January 5, 1950.) [35]

Thursday, January 5, 1950, 9:30 A.M.

The Clerk: Porter vs. State Farm Mutual Automobile Insurance Company and others, on trial.

The Court: Gentlemen, I have decided at the present time to deny the motion as to both counts of the complaint. I am somewhat in a quandary as to the second count.

Looking over that note, 81 ALR, seemed to me that disposition of the Court was to find a waiver or an estoppel in the event that the insurance company at the time of taking over the defense of the action didn't notify the insured, whoever they were defending, that they were doing it with the reservation. I prefer not to grant the motion at the present time, although I am not entirely satisfied in view of the provisions in the policy itself.

I would suggest we proceed with the trial of the case.

(Whereupon there followed further argument by counsel for the plaintiff and counsel for the defendants.)

Mr. Heafey: There is another matter, your Honor, certain depositions in this case taken under stipulation, and I think we are going to offer these depositions in evidence and I think counsel wants to object to certain parts of them.

Mr. Boyd: I don't know whether the original is available, but there are several objections we have to them. There are about five depositions.

The Court: Tell me about them.

Mr. Boyd: We start out, the first deposition is the deposition of a witness, G. Henry Crane, who is an employee of the First National Bank and who testifies that there was a mortgage placed on this automobile and that there was a mortgage placed prior to the time that the insurance policy was written. Now, in the first place, your Honor will recall that counsel has withdrawn his defense that the automobile was mortgaged and that fact was not disclosed to the insurance company upon receipt of the application that—following that the mortgage was shown, and in the second place, if we interpret the contract—if your Honor please, the mortgage applies only to condition B of the policy which has nothing to do at all with this action. Coverage A is the personal injury liability and the policy specifically provides that the mortgage only

applies to the property damage and collision portions of it. So we don't feel that the testimony of this witness in its entirety as to the fact that there was a mortgage, a chattel mortgage on this automobile, is material, and we think that we would like to make an objection that it is incompetent, irrelevant and immaterial in its entirety and it is also hearsay as far as the plaintiff is concerned and has no bearing and wouldn't tend to prove or disprove any issues in this case.

The Court: Isn't there another defense based on the mortgage to the effect that having mortgaged the property they had [37] no right to take it out of the State of Nebraska?

Mr. Heafey: That is our purpose, your Honor.

Mr. Boyd: It seems to me that the answer to that is simply this: there is no indication, there is no evidence in any part of this deposition that the wife mortgaged the automobile at all. All they prove in these depositions is that the husband placed a mortgage on the automobile and if we may go a little further on that same subject to the thoughts we have on the——

The Court: Isn't the best evidence the chattel mortgage itself?

Mr. Boyd: I would think so.

Mr. Castro: Also the criminal proceeding, which is referred to, dismissed for insufficiency of the evidence, and I don't see how a dismissal can be used in this case. If she had pled guilty to violating a law, it might be a different proposition.

Mr. Boyd: We go further and we have the depositions of a deputy county attorney, Herbert A. Ronin, who testifies——

Mr. Heafey: I don't think we will offer that in evidence. That merely shows that a complaint was sworn out and that she was arrested as a result of that complaint. We are not going to offer that in evidence, your Honor, but we do feel this testimony with reference to the fact that the car was mortgaged is admissible on the theory that he would not have [38] granted permission for her to take the car out of the state of Nebraska, knowing it was a crime to take it out, being mortgaged. May be a party to that crime.

Mr. Boyd: If that is withdrawn, may we go further so your Honor will have the entire picture? I know your Honor hasn't had the chance to see the depositions. In Mr. Ronin's deposition there are various telegrams that are introduced as exhibits showing that——

The Court: Who is Ronin?

Mr. Boyd: Deputy county attorney. Showing that the sheriff in Lincoln had wired the sheriff in San Jose and so forth to pick up the wife and bring her back. I take it those will not be offered?

Mr. Heafey: Those are all in the body of the deposition of Ronin.

Mr. Boyd: We can go further and we have the testimony of Leland M. Towle, who is the clerk of the Municipal Court and who testifies as to the issuance of the complaint against the wife, which

is also attached as a—alleging against Carol Doris Mehlin the crime of removal of mortgaged property from the state. And in the testimony itself it is shown, and by these exhibits, that that charge was dismissed for insufficiency of evidence.

So, insofar as the criminal proceeding in its entirety, whether it be the testimony of the deputy district attorney or [39] the clerk of the court or of the orders and the exhibits and the warrants, and so forth, we don't feel that it would be admissible under any circumstance because it was dismissed and it was only a charge.

Now, we feel that if any of this evidence is read to the jury they may think that there is something that was done, that was wrong, when as a matter of fact the entire matter was in effect dismissed by the deputy district attorney because of insufficiency of the evidence. And if we understand the rules under any theory, a charge, unless there is a conviction, cannot be held against the—certainly the plaintiff in this action, a stranger to the entire proceeding.

Mr. Heafey: We are not trying to prove a charge. Your Honor, we merely offer in evidence the deposition of the assured, Mr. Mehlin, and his wife, Mrs. Mehlin, and also of the banker, Mr. Crane. The testimony of the banker, Mr. Crane, is to the effect that there was a mortgage on this Ford automobile and the mortgage was in full force and effect on the 14th day of October, 1947, when the automobile was taken out of the state. That

is our sole purpose in showing that. With reference to the testimony of the county attorney and the clerk, we will not offer those in evidence. Mrs. Mehlin has testified——

The Court: You are not offering in evidence the complaint against Mrs. Mehlin and the dismissal at all? [40]

Mr. Heafey: No, your Honor, because in her deposition she mentions the fact that she was arrested in California for removing property and brought back. We want that in, of course, and that is sufficient to cover the matter.

Mr. Boyd: Now, if I understand correctly, counsel, we are down now to the deposition of Mr. Mehlin and Mrs. Mehlin, is that correct?

Mr. Heafey: That is right.

The Court: Only if he wants to offer the deposition of the bank to show about this mortgage.

Mr. Heafey: Yes, Crane.

Mr. Boyd: We feel that mortgage is entirely foreign to the issues in this case because first of all, if your Honor please, Mr. Mehlin himself doesn't testify that he forbade his wife to take the car out of the state and all of this mortgage business is——

The Court: Presumption, I suppose he has obeyed the law.

Mr. Boyd: But all this mortgage, as we see it, your Honor, the bank may have a right of action, of criminal action or something against anyone taking mortgaged property out of the state, but all this mortgage and all this testimony is related to

a husband. In other words, the bank is making no complaint. The husband wanted to find his wife for him, and apparently the only way he could find her was to have the sheriff look for her and the only way the sheriff could look for her was to have some [41] kind of charge made out, so put it on this mortgage proposition. We think the entire thing is entirely immaterial, prejudicial to our interests.

Mr. Heafey: There is an inference by reason of the fact she had, the wife, she had permission to take it out of the state. This certainly counteracts this inference. The fact that the car was mortgaged and should not have been taken out of the state without consent of the mortgagor.

Mr. Bledsoe: It also goes to the question that they claim the insurance company should have investigated further with reference to the car being used in California and I think the insurance company would be entitled to assume that the law was obeyed and nothing was wrong in view of the fact that the company knew that there was a mortgage with such restrictions on it.

Mr. Castro: May I point out, on the mortgage itself, that the vehicle can't be brought out of state without the permission of the mortgagor. My recollection of the deposition is that there is no testimony by the mortgagor any place that the permission to bring the vehicle out of the state was not given.

Mr. Heafey: States in the deposition: "Did

you on or before that time give permission to take the car to California?"

Mr. Boyd: That is in Mehlin?

Mr. Heafey: That is in the bank.

Mr. Castro: That is in the mortgage, and the mortgage [42] provision relates to the consent of the mortgagor and the permission of the mortgagor and I think that is entirely lacking in all of those depositions.

The Court: In other words, the law in Nebraska is to the effect that property which is subject to a chattel mortgage cannot be taken out of the state, probably a misdemeanor to take it out of the state unless you do so with the permission of the mortgagor.

Mr. Heafey: That is correct, your Honor.

The Court: No evidence here that the mortgagor hadn't given that permission.

Mr. Boyd: That is correct.

The Court: Well, it would seem that there wouldn't be foundation for it if there is no evidence permission hadn't been given by the mortgagor.

Mr. Castro: It seems to me that the burden of proof is on the plaintiff in that respect to establish permission and show that it was rightfully taken from the state. We don't have to show that it wasn't. The burden of proof, all the elements themselves under the policy, and the granting and permission to use the automobile is on the plaintiff.

The Court: Well, I haven't seen, of course, the law, the provisions of the law in Nebraska to which

you refer. I will allow the evidence of that banker in and then later on, perhaps, strike it out and instruct the jury that that law did not prevent [43] her from taking the automobile out of the state of Nebraska.

Mr. Boyd: I don't think there is any mention and we have carefully gone over the deposition and counsel has just looked through it, and the only evidence is that Mehlin, the husband, took a mortgage which the insurance company knew about as shown by their withdrawal of that defense.

Mr. Heafey: No question about that.

Mr. Boyd: I really feel that wouldn't be introduced had it not been for that additional defense, but it is in the depositions we feel there might be some inference the jury might draw from the fact that there was a mortgage, that she was guilty of a crime, or something of that kind. If there is any evidence, of course, introduced, why the dismissal of the complaint for insufficiency of the evidence is of course the answer.

Mr. Bledsoe: Mr. Boyd, if it wasn't dismissed for insufficiency of the evidence, I think the prosecuting attorney dismissed, said he didn't have enough evidence, wasn't any evidence which in——

Mr. Heafey: Through a reconciliation.

Mr. Boyd: January 9, 1948, dismissed by the county attorney for insufficient evidence, so that the——

Mr. Heafey: On the motion of the county attorney. That doesn't show any trial of the action.

Mr. Castro: Who usually makes the motion, counsel? [44]

The Court: Of course, that hasn't anything to do with the testimony of the banker that there was a chattel mortgage.

Mr. Boyd: No, it would not.

The Court: Not asking to put all that record in?

Mr. Boyd: As a matter of fact, if your Honor please, Mehlin himself in his testimony testifies that there was a chattel mortgage on the car at the time that it was, that the policy was issued.

The Court: Well, what difference would it make?

Mr. Boyd: The banker can confirm that.

Mr. Heafey: Any objection to the deposition of Mrs. Mehlin?

Mr. Boyd: Yes, I have one or two. In Mr. Mehlin's deposition on page 20, beginning on line 9, counsel, and continuing until page 22, line 10, we go over the fact that Mr. Mehlin himself went to see the county attorney about the swearing out of the warrant and all of that same evidence that counsel has already withdrawn and so far as the deputy district attorney and the exhibits and so forth.

Mr. Heafey: It goes farther than that, counsel. It might be well to read these questions and answers. You haven't got a copy of the deposition? This refers to whether or not he has given consent for taking the car. Starts at line 9 and goes down to the bottom.

Mr. Boyd: Next two pages, goes to the county attorney's [45] filing of the warrant and complaint and so forth.

Mr. Heafey: Our theory is that it certainly shows that he couldn't have acquiesced or taken the car out of the state.

The Court: I think it is admissible on that.

Mr. Boyd: I have one or two others. On page 27, counsel, lines 1 to 3, just one question here. This seems like a comparatively small matter, your Honor, but don't like to get all the dirt.

"Q. When did you first contact the firm of Ginsburg & Ginsburg?

"A. I applied for a divorce through Mr. Ginsburg."

We want to make an objection on that, that answer is not responsive to the question and not a technical objection, but we don't see all of this divorce and all of this crime, and so forth, should be brought in, might affect our clients' interests.

Mr. Heafey: In that connection you recall that there is a letter from Ginsburg to Dana's office stating that he was representing them in the divorce action and that was the first notice that Dana's office had on the matter, and we are going to offer that in evidence, and this merely confirms it.

The Court: The answer is not responsive. Asked when he first saw Ginsburg and then when "I applied for a divorce . . ." but it isn't a responsive answer.

Mr. Heafey: That isn't your Honor, but the

next question was: "When was this?" And the answer was: "About December of [46] '47."

The Court: You can read it so that it reads: "When did you first contact Ginsburg?" The answer would be: "About December, 1947."

Mr. Heafey: That is all right.

Mr. Boyd: Very satisfactory. Now, on page 29, counsel, line 25 until 30, We have additional testimony, your Honor, about the wife being returned by the sheriff, and so forth, and I understand your Honor's ruling you feel that is admissible under the theory of permission?

The Court: That is right. In other words, an inference must be drawn from that that he didn't give his wife permission to take his car. The jury has a right to draw that inference.

Mr. Castro: Even where the criminal charge was dismissed, your Honor?

The Court: I would think so.

Mr. Castro: I think the record should show the criminal charge was dismissed for insufficiency of the evidence.

Mr. Heafey: Going to put that in, we have to put all the documents about the issuing of a complaint and the date, and so forth.

Mr. Boyd: If we do have this read into the record that the lady was charged with a crime, certainly it would be permitted to show that it was dismissed by insufficiency of the evidence. Otherwise, the jury might draw the conclusion that [47] she was guilty and convicted of the crime.

The Court: I think that there ought to be some evidence to that effect, either by stipulation or statement.

Mr. Heafey: We will stipulate to it Judge.

The Court: Because I think the full facts ought to be in, whether they may have been reconciled so he didn't prosecute the charge, and so forth, ought to be brought to the attention of the jury that the charge was dismissed on the ground of lack of insufficiency of the evidence.

Mr. Boyd: It may be stipulated, counsel, that the charge was dismissed for insufficiency of the evidence?

Mr. Heafey: That is right, on January 9, 1948.

Mr. Boyd: I believe that is all the objections we have, your Honor.

The Court: Yes, there is a statement in there by Ronin, who was a district attorney, sending for his wife and bringing her back.

Mr. Bledsoe: I just wanted to establish that was done before the accident happened.

Mr. Heafey: The 16th of October.

The Court: All right, Mr. Linehan, bring the jury in.

(The following proceedings were had in the presence of the jury.)

The Court: Will you stipulate that the jury is here?

Mr. Boyd: Yes, your Honor. [48]

Mr. Heafey: Yes, your Honor.

At this time, if the Court please, the defendant

offers in evidence and asks permission to read to the jury the deposition of G. Henry Crane, which was taken by stipulation on the 20th day of December, 1949, at the offices of Davis, Stubbs & Healey, 1521 Sharp Building, Lincoln, Lancaster County, Nebraska, on behalf of the defendant, the State Farm Mutual Automobile Insurance Company.

The Court: Do you want to read all of it, or want to have somebody read the questions and somebody read the answers?

Mr. Heafey: What is your practice?

The Court: I think it would be better for the jury if we followed that.

Mr. Heafey: I can read the questions and Mr. Bledsoe the answers.

The Court: Yes.

Mr. Heafey: And at the time these depositions were taken, there were present on behalf of the plaintiff in this action, Mrs. Porter, Mr. Robert C. Guenzel, of Pansing & Guenzel, attorneys-at-law, 414 Federal Securities Building, Lincoln, Nebraska, and Mr. Daniel Stubbs, of Davis, Stubbs & Healey, attorneys-at-law, 1521 Sharp Building, Lincoln, Nebraska, appearing on behalf of the State Farm Mutual Automobile Insurance Company.

The Court: I think, Mr. Heafey, since there are only two [49] copies of that and the other side will want to follow one copy, you'd better go ahead and read it all yourself.

Mr. Heafey: Shall I sit on the witness stand?

The Court: Yes.

Mr. Heafey: "Direct Examination by Mr. Stubbs:"

G. HENRY CRANE

produced as a witness on behalf of the defendant The State Farm Mutual Automobile Insurance Company, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, depose and sayeth as follows:

Direct Examination

By Mr. Stubbs:

Q. Your full name, Mr. Crane.

A. G. Henry Crane.

Q. And what is your present employment?

A. The First National Bank.

Q. What is your position with the First National Bank? A. Assistant cashier.

Q. Are you in charge of the Department of Car Loans also? A. Yes, sir.

Q. And you have been in that employment or in that capacity how long?

A. About six years.

Q. So you were so employed during the entire year of 1947? A. Yes.

Q. And in that capacity, and on behalf of the First National Bank, did you have any business dealings with Mr. Wilbur M. Mehlin?

A. Yes.

Q. And what did that business transaction relate to, Mr. Crane?

A. It was in connection with a loan.

(Deposition of G. Henry Crane.)

Q. And that loan was made by whom?

A. Wilbur M. Mehlin.

Q. And who loaned him the money?

A. I did.

Q. Now, in connection with that loan, was there any security taken?

A. Yes; a 1936 Ford Coach.

Q. You mean you took a chattel mortgage on that automobile? A. Yes.

Q. And can you further describe the automobile? A. Oh, just the motor number.

Q. You may give that.

A. No. 2-922886.

Q. And that automobile was owned by him at that time? A. Yes.

Q. And when was the loan made, Mr. Crane?

A. Well, it was July 17, 1947.

Q. Was there a loan made prior to that time?

A. There was.

Q. And when was the first loan made?

A. (Referring to memorandum) February 3, 1947.

Q. How much was the loan?

A. The original loan?

Q. Yes. A. \$375.84.

Q. And to secure that loan you took the chattel mortgage that you have described?

A. I did, yes.

Q. On the automobile that you described?

A. Yes.

(Deposition of G. Henry Crane.)

Q. Now, that loan was refinanced on July 17, was it? A. Yes.

Q. And what was the amount of the loan at that time? A. You mean the original loan?

Q. Yes. A. \$363.66.

Q. And did you continue or hold the chattel mortgage on the automobile you have described?

A. I did.

Q. In connection with the refinancing?

A. Yes.

Q. And on that same automobile that you have previously described? A. Yes.

Q. Was that loan and chattel and mortgage in effect on August 22, 1947? A. Yes.

Q. And had there been some payments on it prior to that time? A. August 5.

Q. How much was paid on it? A. \$24.25.

Q. And what was the balance then on August 22, 1947? A. \$339.71.

Q. And you held a chattel mortgage on the automobile you have described on August 22, 1947, to secure that loan? A. Yes.

Q. Now, were there any further payments after August 27?

A. September 2, September 29, November 4, and December 23, 1947, and January 14 of 1948, and the unpaid balance on January 30, 1948.

Q. Perhaps you should state what payments were made on each of those dates, Mr. Crane.

A. \$24.25 on each date except the last one, \$218.16.

(Deposition of G. Henry Crane.)

Q. So that loan was gradually paid down to \$218.16? A. Yes.

Q. And that full balance was paid on what date?

A. January 30, 1948.

Q. And at that time you released the mortgage and turned back the note to Mr. Mehlin?

A. Yes.

Q. The mortgage had not been released at any time prior to that? A. No.

Mr. Stubbs: I think that's all. Do you have any cross?

Mr. Guenzel: I have just one question.

Cross-Examination

By Mr. Guenzel:

Q. Did you on behalf of the bank, or the bank on its own behalf, ever cause to be filed any legal action relative to this note for the chattel mortgage which you have described? A. No.

* * *

Mr. Boyd: For the record, we would like to state on behalf of the plaintiff, we will waive the cross-examination of all of these witnesses in the depositions. We do not desire to read any part of the cross-examination or any part of the depositions ourselves.

The Court: Well, I assume, it being a deposition, the other side can use the cross-examination.

Mr. Heafey: That is correct.

Mr. Boyd: I wanted to make clear we wouldn't request the reading of the cross-examination.

Mr. Heafey: You don't mind if I continue?

Mr. Boyd: Whatever you care to do, counsel.

Mr. Heafey: And then we offer in evidence the deposition of Wilbur M. Mehlin, taken at the same time and place and with the same attorneys present on behalf of the same parties. We ask permission to read this deposition to the jury.

The direct examination by Stubbs:

WILBUR M. MEHLIN

Direct Examination

By Mr. Stubbs:

Q. Your full name, please.

A. Wilbur M. Mehlin.

Q. And you are the Wilbur M. Mehlin who owned a 1936 Ford Tudor automobile with motor 2-922886, during 1947? A. Yes.

Q. And that automobile was later involved in an accident in California? A. Yes.

Q. Now, where do you live, Mr. Mehlin?

A. 3108 Starr Street.

Q. In Lincoln? A. Yes.

Q. And where did you live in October of 1947?

A. 210 North Twenty-ninth.

Q. And both of those addresses are in Lincoln, Nebr.? A. Yes, sir.

Q. What relation do you bear to Carol Mehlin?

A. Husband.

Q. Were you the husband of Carol Mehlin in October of 1947? A. Yes.

(Deposition of Wilbur M. Mehlin.)

Q. When did you first acquire the automobile that you have described, Mr. Mehlin?

A. I got the automobile in January, 1946.

Q. And was it registered in your name?

A. Yes.

Q. In that year 1947 did it have any mortgage against it? A. Yes, it did.

Q. And you had made a loan which was secured by that mortgage? A. Yes.

Q. And where did you make the loan?

A. The First National Bank of Lincoln, Nebraska.

Q. And do you remember when you first made that loan, Wilbur? A. When I first made it?

Q. Yes, the one with the First National Bank.

A. Let's see. The exact date I couldn't say.

Q. Well, about when, to the best of your recollection?

A. To the best of my ability, it would be in July, 1947.

Q. Could it have been earlier than that, if the bank's records showed that it was?

A. If the bank's records showed that it was, yes. The exact date I don't know.

Q. And approximately how much was the amount of the mortgage?

A. Approximately \$375.

Q. You executed and gave to the bank a chattel mortgage on the automobile you have described?

A. Yes.

Q. To secure that loan? A. Yes.

(Deposition of Wilbur M. Mehlin.)

Q. And was there still a balance owed on that loan August 22, 1947? A. Yes.

Q. And the car was mortgaged to secure that loan on that date? A. Yes.

Q. Was the mortgage still existing on the car during all of October, 1947? A. Yes.

Q. Can you give me the approximate amount of the mortgage existing on the car on August 27, 1947?

A. Approximately \$350, to the best of my ability.

Q. And what was the amount of the unpaid balance on the mortgage during the month of October, 1947? A. Approximately \$250.

Q. During the month of October, 1947, where were you living? A. Sir?

Q. Where did you live during the month of October, 1947?

A. At 210 North Twenty-ninth.

Q. And were you and your wife residing together at that time? A. Yes.

Q. You had a child at that time?

A. Yes.

Q. Just the one? A. One, yes, a boy.

Q. And how old was he?

A. At that time?

Q. Yes. A. Three.

Q. He was three years old? A. Yes.

Q. Now, did anything happen between you and your wife during the early part of October?

(Deposition of Wilbur M. Mehlin.)

A. No.

Q. Do you know about when it was that your wife left and went to California?

A. On or about October 14.

Q. Now, did you have any knowledge at that time that she was going to California?

A. No, sir.

Q. When did you first discover it?

A. When she left or——?

Q. Yes.

A. I had went to work in the morning and in the evening I knew she was gone.

Q. When you returned home? A. Yes.

Q. What did she take with her?

A. She took all of her personal belongings and some household belongings.

Q. Did she take this car that you have described? A. Yes, she took the car.

Q. Did you on or before that time give your wife permission to take your car to California?

A. No, sir.

Q. At the time that you discovered she was gone, did you know where she had gone?

A. No, I did not.

Q. You didn't discover where she had gone until afterwards?

A. Until afterwards; that's right.

Q. Did she, in going to California, go upon any business of yours? A. No, sir.

Q. Did you have any business to be transacted in California? A. No.

(Deposition of Wilbur M. Mehlin.)

Q. By her or anyone else? A. No.

Q. At the time the accident occurred in California on the 31st day of October, 1947, where were you?

A. I was in Lincoln, Nebraska.

Q. And what employment did you have at that time?

A. I worked at Cushman's Motor Works.

Q. Prior to that time, what employment had you had, Mr. Mehlin?

A. Cushman Motor Works.

Q. You had worked there commencing about when?

A. I went to work for Cushman's in March of 1942.

Q. And, of course, you were in the service?

A. Yes.

Q. So, while you were in the service, you were not working for Cushman's? A. No.

Q. As soon as you came back you started working for them again? A. Yes.

Q. And you had worked there continuously up until the time that your wife left, as you have described? A. Yes.

Q. And for some time after that?

A. Yes.

Q. How long after that did you work at Cushman's?

A. I worked at Cushman's until April of 1949.

Q. And where did you live during all of that time?

(Deposition of Wilbur M. Mehlin.)

A. All of that time I worked at Cushman's?

Q. Yes.

A. I lived at 210 North Twenty-ninth and 3108 Starr.

Q. And when did you move to 3108 Starr Street? A. Sometime in January of '48.

Q. And you have been living right here in Lincoln all of the time? A. Yes.

Q. And you worked at Cushman's until April of this year? A. Yes.

Q. Since that time where have you been working?

A. I worked during the summer out at the State Hospital, and then a short time this fall I worked for Bullocks Sodding Company, and at present with the Vermaas Service Station.

Q. And all of that has been right herein Lincoln, Nebr.? A. Yes.

Q. And you have lived at no other places except these two addresses you have given me in Lincoln, Nebr.?

A. I resided with my folks for a while, while she was gone.

Q. Now, had you prior to October 31, 1947, signed an application for a driver's license within the State of California? A. No.

Q. Had you at any time executed an application for a driver's license with any other person for a driver's license in the State of California?

A. No.

(Deposition of Wilbur M. Mehlin.)

Q. Did you on October 31, 1947, have any acquaintance with Duane R. Claggett?

A. No.

Q. Did you ever know him? A. Never.

Q. You don't know him now? A. No, sir.

Q. So that Duane R. Claggett on October 31, 1947, did he have any business of yours to transact or on your behalf in the State of California?

A. No.

Q. Did you at any time prior to October 31, 1947, or on that date give Duane R. Claggett permission to drive your 1936 Ford automobile, which you have described? A. No.

Q. Do you have any knowledge that on the 31st day of October, 1947, or at any time prior to that date, that Duane R. Claggett did drive your automobile? A. No.

Q. Now, prior to that time when Mrs. Mehlin, your wife, left you in October of 1947, who lived with you in your household?

A. My wife and boy.

Q. Do you still have the automobile that you have described? A. No.

Q. What happened to it?

A. There was some liability when it was wrecked, and it was towed into a place in California and left there.

Q. Was it finally sold? A. Yes.

Q. And did you sign a bill of sale to someone in California? A. Yes.

(Deposition of Wilbur M. Mehlin.)

Q. And when did that occur?

A. Approximately in April or May of 1948.

Q. And at the time it was sold, it was still registered in your name? A. Yes.

Q. Now, when you bought the car where did the money come from to purchase it?

A. I had my mustering out pay from the Army, and my wife had a little money in the bank, that I got a chance to pay the balance.

Q. Now, where did this money in the bank come from?

A. Out of some money that I had sent while I was in the Army.

Q. When you discovered that your wife had left, did you see anybody about it? A. Yes.

Q. Did you see any officers about it?

A. I went to the County Attorney's office.

Q. And whom did you see there?

A. Mr. Ronin.

Q. And you told Mr. Ronin what had happened?

A. Yes.

Q. And what did you ask Mr. Ronin to do?

A. To try to locate my boy and wife.

Q. Did you cause a complaint to be filed against your wife? A. Yes.

Mr. Stubbs: Will you mark this for identification?

(Marked for identification Exhibit No. 1, witness Mehlin.)

Q. (By Mr. Stubbs): Now, handing you what

(Deposition of Wilbur M. Mehlin.)

the reporter has marked Exhibit 1, is that the complaint that you caused to be filed against your wife? A. Yes.

Q. And the signature "Wilbur M. Mehlin" at the bottom of Exhibit 1, is that your signature and did you sign that complaint? A. Yes, sir.

Q. And did you sign it before the clerk of the court? A. Yes, sir.

Q. And what date did you sign that complaint?

A. (Referring to Exhibit 1) October 23, 1947.

Q. And was it filed that day in the Municipal Court of the City of Lincoln, Nebraska?

A. Yes.

Q. And do you know if efforts were made to bring your wife back from California after this complaint was signed? A. Yes.

Q. Who made those efforts?

A. The County Attorney.

Q. You mean Mr. Ronin, the Deputy County Attorney? A. Yes, sir.

Q. Was your wife finally returned to Nebraska?

A. Yes, sir.

Q. Do you know whether she made appearances in court on this complaint? A. Yes.

Q. Now, at some later time did you and you and your wife become reconciled? A. Yes.

Q. And that was some time after she had been returned to Nebraska? A. Yes.

Q. Had she been back in Nebraska some time before that reconciliation took place?

(Deposition of Wilbur M. Mehlin.)

A. Yes.

Q. And about when, then, did she join your household again?

A. About January of '48.

Q. At the time you filed this complaint on the 23rd day of October, 1947, did you know about any accident in which the car was involved?

A. No.

Q. It hadn't happened yet, had it, Mr. Mehlin?

A. No, not that I know of.

Mr. Stubbs: I think that's all.

* * *

Mr. Castro: May the record be completed, your Honor, concerning the criminal proceedings at this time, so there may be continuity in the jury's mind?

The Court: You were going to stipulate——

Mr. Heafey: Stipulate to the effect that this complaint which was filed by Mr. Mehlin on the 23rd day of October, 1947, in which Carol Doris Mehlin was charged with taking mortgaged property out of the state of Nebraska without the consent of the mortgagee was subsequently, in January of 1948, on January 9, 1948, dismissed by the county attorney for insufficient evidence.

Cross-Examination

By Mr. Guenzel:

Q. When were you married to Carol Mehlin?

A. We were married on February 12, 1941.

(Deposition of Wilbur M. Mehlin.)

Q. Where did this marriage take place?

A. Humboldt, Nebraska.

Q. Following your marriage, then, you came to Lincoln and you were employed here, is that right? A. Not immediately, no.

Q. You came to Lincoln in 1942, is that right?

A. Yes.

Q. After you were married did Mrs. Mehlin ever work? A. Yes.

Q. Where did she work.

A. Do you mean before this happened?

Q. Well, since your marriage, yes. Subsequent to your marriage. After you were married, you said, she worked, and I am asking this: Where did she work after you were married?

A. She worked at Walgreen's in Lincoln here, and she worked at the Rusco Window Company and at Boomer's Printing Company.

Q. And over what period of time was she employed there? In other words, has she worked all the time since you were married?

A. She worked after she came back from California.

Q. Did she ever work before she went to California? A. No.

Q. You said when you bought this automobile you purchased it with your mustering out pay from the Army? A. Yes.

Q. And with some money that your wife had in the bank, and the balance you paid? A. Yes.

(Deposition of Wilbur M. Mehlin.)

Q. Why did you buy the automobile?

A. For personal business.

Q. After you purchased the automobile, who used it? A. My wife and I.

Q. Did your wife have a license to drive the automobile? A. Yes, sir.

Q. Approximately how often did she use the car? In other words, did you leave it at home during the day while you were at work, or what was your custom? What did you usually do?

A. Oh, I would leave it at home two or three times a week for her to go to the store and what business she had.

Q. When did you first learn of the accident that occurred on the 31st of October?

A. Well, I didn't know about it for sure until after she had come back.

Q. How did you first learn of the accident? Did she tell you? Is that the way that you learned it, or did she write about it, or how did you find out about it?

A. (Witness hesitates.) I'm not positive.

Q. Beg pardon?

A. Just how, I'm not positive.

Q. But you learned about it about the time that she came back? A. Yes.

Q. And she either told you or perhaps her mother told you, or something like that, is that right? A. (No response.)

Q. Is that right, Mr. Mehlin? That she told

(Deposition of Wilbur M. Mehlin.)

you or perhaps her mother told you when she came back? A. I'm not sure.

Q. When were you first contacted by anyone from the State Farm Mutual Insurance Company about the accident? A. The exact dates?

Q. No. Approximately. Just the month.

A. I would say you could find out this information from Joseph Ginsburg, the attorney, because exactly I don't know. It's been some time ago, and I would hate to say.

Q. Do you remember when you were first contacted by The State Farm? Did they write you a letter or send you a telegram, or did someone come to see you?

A. I think I got a letter about the matter, and I just had a deposition made of it.

Q. Do you have that letter?

A. That I would have to look up.

Q. Would you look for it and see if you can find it? A. Yes, sir.

Q. Do you remember who wrote the letter?

A. I'm not sure, no.

Q. What did you do after you received the letter?

A. I waited for contact with the deposition and the lawyers to come out and take the depoistion.

Q. Did you ever make a written report to The State Farm relative to the occurrences leading up to the accident? A. Personally, no.

Q. Have you ever heard the name of the firm of attorneys of Dana, Bledsoe & Smith?

(Deposition of Wilbur M. Mehlin.)

A. Yes.

Q. When did you first hear those names?

A. I don't know.

Q. Do you remember who first told you about these attorneys? A. No.

Q. Was that in the letter you got from State Farm? A. That I'm not sure.

Q. Did you ever receive a letter from Dana, Bledsoe & Smith? A. I don't know.

Q. When did you first contact the firm of Ginsburg & Ginsburg?

* * *

Q. Who advised you; or did anyone advise you to have Ginsburg & Ginsburg write a letter to Dana, Bledsoe & Smith?

A. Nobody advised me that I know of, no.

Q. Did you know that Dana, Bledsoe & Smith had received a letter from Ginsburg & Ginsburg, wherein Ginsburg & Ginsburg represented themselves as your attorneys relative to this accident?

A. Repeat that again, please.

(Question read.)

A. (No response.)

Q. Did you know that such a letter had been written? A. I'm not sure.

Q. Do you remember ever asking Ginsburg & Ginsburg to write such a letter?

A. I'm not sure.

(Deposition of Wilbur M. Mehlin.)

Q. Now, going back to a year ago this summer, which was when the letter was written, do you remember having any conferences with Ginsburg & Ginsburg concerning this accident?

A. The conferences I remember of having with them was over the settlement on the car.

Q. Did you ever pay Ginsburg & Ginsburg for any services rendered concerning the accident other than the settlement in connection with the sale of the car?

A. To the best of my knowledge, no.

Q. Have you ever been interviewed by anyone from the State Farm Mutual Insurance Company about the accident?

A. How do you mean, sir?

Q. Well, I mean like—not as formal as the taking of a deposition, but has anyone from State Farm ever come and asked you questions about the accident—about the events leading up to your wife's leaving for California?

A. No, I don't believe so.

Q. Where did you obtain your insurance policy with State Farm?

A. From Mr. Ludlam.

Q. That was here in Lincoln?

A. Yes.

Q. At the time you applied for your insurance did you make any written application?

A. I applied for the policy, yes.

(Deposition of Wilbur M. Mehlin.)

Q. Did you fill out a written form in applying for the policy, do you remember?

A. Yes, there was a form made out.

Q. Did that form contain any statement inquiring about mortgages on the car?

A. To the best of my knowledge, no.

Q. Do you have a copy of that written application? A. I will look, sir.

Q. But you don't know whether you have any or not?

A. Whether I still have or not, I don't know, or ever did have.

Q. Now, when your wife came back from California, did she come back voluntarily or was she brought back by officers?

A. I think she came back voluntarily.

Q. Didn't she come back with her mother?

A. Yes, sir.

Q. When you paid Ginsburg & Ginsburg for the services they rendered, did you get any receipt or anything like that?

A. Just a receipt for the amount, I believe.

Q. Do you have that receipt?

A. That I would have to look for too.

Q. I would like to have you look for it and see if you can find it. A. I will.

Mr. Guenzel: That's all the questions I have.

Redirect Examination

By Mr. Stubbs:

Q. Mr. Mehlin, when your wife returned, you

(Deposition of Wilbur M. Mehlin.)

knew the officers were attempting to effect her return here? A. Yes.

Q. And when you say she came voluntarily, what do you mean by that? Do you mean that she waived extradition in California?

A. Yes.

Q. Did she come back in the custody of someone? A. Her mother came back with her.

Q. Do you know whether her mother had been appointed or deputized to return with her by the officers in Nebraska? A. I'm not sure.

Q. Now, all of the time since October, 1947, until the present time you have been right here in Lincoln? A. Yes.

Q. And have you made any effort to hide or make yourself hard to find? A. No.

Mr. Stubbs: All right. That's all.

Mr. Guenzel: That's all.

I now offer in evidence the deposition of Carol Doris Mehlin, which was taken at the same time and place and with the same attorneys present.

The Court: I think, Mr. Heafey, we will take an adjournment for a few minutes. Ladies and gentlemen, during the adjournment bear in mind the admonition I have heretofore given [51] you.

(Brief recess.)

Mr. Heafey: The deposition of Carol Doris Mehlin:

CAROL DORIS MEHLIN

Direct Examination

By Mr. Stubbs:

Q. Your name is Carol Doris Mehlin?

A. That's right.

Q. And you now live at 3108 Starr Avenue,
here in Lincoln, Nebraska? A. Yes.

Q. And you are the wife of Wilbur Mehlin?

A. Yes.

Q. How long have you been married to Mr.
Mehlin? A. Nine years this February.

Q. Prior to the 14th day of October, 1947, where
did you live?

A. 210 North Twenty-ninth Street.

Q. And you lived with your husband, Wilbur
Mehlin, there? A. That's right.

Q. And you had one child at that time?

A. Yes.

Q. Now, did you in the month of October, 1947,
leave Lincoln? A. Yes, I did.

Q. And on what day did you leave?

A. October 14.

Q. And how did you leave Lincoln? In what
manner? A. You want the transportation?

Q. Yes. A. In a car—a '36 Ford.

Q. That was the 1936 Ford Tudor automobile
which was owned by your husband?

A. That's right.

Q. Now, when you left Lincoln, Carol, where
did you intend to go? A. California.

(Deposition of Carol Doris Mehlin.)

Q. Did you have your husband's permission to drive the automobile to California at that time?

A. No, I did not.

Q. Had you had some difficulty with your husband prior to that time? A. Some.

Q. And when you left home what was your intention as to whether you were separating from him at that time?

A. Well, that was the intentions, that I was going to stay.

Q. You didn't tell him you were going?

A. No.

Q. Besides the car, what did you take with you?

A. I took my son and personal belongings.

Q. And you intended to separate from him and his household at that time? A. Yes.

Q. You didn't intend to come back?

A. No.

Q. Did you drive directly to California?

A. That's right.

Q. And where to in California?

A. Richmond, California.

Q. Now, who went with you to California?

A. Is that necessary?

Q. Well, it has all been written out before, Carol.

A. Paul Weisberger and Phil Curren.

Q. And your son?

A. And my son, that's right.

Q. Did anyone who went with you have your

(Deposition of Carol Doris Mehlin.)

husband's permission to drive or take your husband's automobile at that time? A. No.

Q. Did any of these other persons have any business to conduct on behalf of your husband?

A. No, they did not.

Q. Did you have any business to transact in California on behalf of your husband?

A. No, I did not.

Q. Were you in the automobile at the time it was involved in an accident on the 31st day of October, 1947? A. No, I was not.

Q. Do you recall whether the sheriff out there had contacted you at that time yet, or not, Carol, about the complaints filed here?

A. Do you mean while I was out there?

Q. Yes.

A. No. I didn't know anything about it until I came home.

Q. Well, when did you first learn about the accident?

A. Well, I knew the accident had happened that evening.

Q. In a short time after it happened?

A. Yes.

Q. The driver came back and told you?

A. That's right.

Q. Where were you at the time the accident happened? A. In Richmond.

Q. Whom were you staying with there?

A. Carl Claggett and his family.

(Deposition of Carol Doris Mehlin.)

Q. And they are relatives of yours?

A. No.

Q. Do you know who was driving the car at the time of the accident? A. Duane Claggett.

Q. And was he on any business of yours or your husband's at the time? A. No, he was not.

Q. Did Duane Claggett tell you what he was driving the car for?

A. The only thing I knew was that he had a date in Oakland.

Q. You don't have and never did have a driver's license in California? A. No, I did not.

Q. Mr. Duane Claggett—was he in Lincoln at any time? A. Not that I ever knew, no.

Q. He was not here in October, 1947?

A. No.

Q. And you met him only after you arrived in California? A. That's right.

Q. Had you known Duane Claggett before you arrived in California at all? A. No.

Q. You had met him only after you had got out there, after leaving here on the 14th day of October, 1947? A. That's right.

Q. Were you arrested in California, Carol?

A. Yes, I was.

Q. Did they put you in jail out there?

A. That's right.

Q. You were arrested on a complaint filed by your husband here?

A. I don't know whose complaint it was. I was arrested for taking a car out of the State.

(Deposition of Carol Doris Mehlin.)

Q. And how were you brought back to Nebraska?

A. Well, I came back with my mother. My mother brought me back.

Q. Do you know whether your mother had been authorized to bring you back by the authorities here in Nebraska? A. Yes.

Q. Do you remember the day you arrived back in Lincoln? A. Not exactly I don't.

Q. Were you taken——

A. (Interrupting): It was somewhere in there of December. I'm not sure at all. I know the next day I went to court here.

Q. The next day you went up to the Municipal Court? A. Yes.

Q. And what happened there?

A. I was out on bond until the trial came up.

Q. And the case was ultimately dismissed?

A. That's right.

Q. And it was some time after the case was dismissed that you became reconciled again with your husband? A. That's right.

Q. And about when did you become reconciled with your husband again?

A. February the following year, or in March.

Q. In 1948? A. Yes.

Mr. Stubbs: You may inquire.

Cross-Examination

By Mr. Guenzel:

Q. Mrs. Mehlin, when did you get married to

(Deposition of Carol Doris Mehlin.)

Wilbur Mehlin? A. February 12, 1941.

Q. And where were you married?

A. Humboldt, Nebraska.

Q. After you were married, were you ever employed anywhere? Did you ever work?

A. No.

Q. Have you ever had a driver's license in Nebraska—a Nebraska driver's license?

A. Yes, sir.

Q. Did you have one in 1946?

A. Yes, I did.

Q. Do you remember when Mr. Mehlin bought the car in question? A. Yes.

Q. After he got that car did you drive it?

A. Quite a bit, yes.

Q. Did you start driving the automobile immediately after it was purchased? A. No.

Q. Well, I mean——

A. (Interrupting): It was quite a while yet before I received my driver's license.

Q. After the purchase of the car, then, you got a driver's license? A. Yes.

Q. And after you got the driver's license, then you started driving the car, is that right?

A. That's right.

Q. Did you put any money into the purchase of the car? A. No.

Q. About how often did you drive the automobile?

A. I wouldn't know. Not very often. Just to town during the week.

(Deposition of Carol Doris Mehlin.)

Q. You would use it for going shopping?

A. That's right.

Q. And Wilbur knew you were using it for shopping and he let you use it for that purpose?

A. That's right.

Q. And he let you use it to drive around town to see your friends?

A. Well, I could use it any time I wanted the car.

Q. Now, after the accident occurred out in California, did you report the accident to anyone connected with The State Farm Mutual?

A. Yes, I did.

Q. When did you do this?

A. It wasn't very long after the accident. Just a few days, I imagine.

Q. Where did you report it?

A. Berkeley. I think the office is in Berkeley.

Q. Were you ever interviewed by anyone from State Farm? Did they ever sit down and talk to you about the accident?

A. There was a man come out from Berkeley one afternoon when we were in Richmond, but it didn't have a great deal to do with me. It had a great deal to do with Duane and his trial.

Q. But he did talk to you at that time?

A. Yes.

Q. Do you remember the name of that man at all?

A. No.

Q. Did you ever make any written report to The State Farm about the accident?

(Deposition of Carol Doris Mehlin.)

A. I think I filled out a form, yes.

Q. You filled out a form when you went to Berkeley to report it? A. That's right, yes.

Q. Do you have a copy of that?

A. No, I do not.

Q. Were you ever interviewed by anyone from the office of Dana, Bledsoe & Smith, attorneys?

A. Where from?

Q. Out in California. A. I don't think so.

Q. Now, since you made that first report of the accident to State Farm, since that first time when the representative came out from Berkeley to talk to you—Claggett and you too—have you ever been interviewed by anyone from State Farm?

A. No, not interviewed, except that last time they took the deposition.

Q. That is the only time?

A. That's the only time.

Q. Had you ever before this time driven the car outside the city limits of Lincoln, say?

A. No. I don't believe I ever have.

Q. Had you ever allowed anyone else to drive the car? A. No.

Q. Had your husband ever told you not to let anyone drive the car? A. Yes.

Q. Did you ever sign a reservation of rights agreement with State Farm?

A. I don't know what that is.

Q. Well, it would be a formal agreement reserving certain rights. A. No.

(Deposition of Carol Doris Mehlin.)

Q. On the day of the accident when Claggett took the car, did you know he was using the car?

A. Yes, I knew he was using it. After he left with it I was pretty sure he was using it.

Mr. Guenzel: That's all.

Mr. Stubbs: I guess that's all, Carol.

Mr. Boyd: Counsel, on this question on page 27, relative to the conversations with Mr. Ginsburg, I understand it may be stipulated that those conversations were in connection with collision damage with the automobile, the settlement of the car, on the bottom of pages 27 and 28, I believe it can be stipulated that that was relative to the settlement of the collision, the settlement of the car?

Mr. Heafey: That's right.

Mr. Bledsoe: That is the sale you are talking about.

Mr. Boyd: Very well.

Mr. Heafey: Mr. Hunt, will you take the stand, please?

WILLIAM R. HUNT

called as a witness on behalf of the defendants, sworn.

The Clerk: Will you state your name to the Court and jury?

A. My name is William R. Hunt.

(Testimony of William R. Hunt.)

Direct Examination

By Mr. Heafey:

Q. Mr. Hunt, what is your business or [52] occupation?

A. I am with the State Farm Insurance Company in Berkeley.

Q. In what capacity?

A. Assistant superintendent of claims for Northern California.

Q. And how long have you occupied that position? A. Well, let's see, about four years.

Q. Now, on the 31st day of October, 1947, you were occupying the position as assistant superintendent of claims?

A. Well, I was working inside. I am not sure just when I received the title of assistant, but I was working inside at the time assisting Mr. Meyers, the superintendent of claims.

Q. Assistant to the manager?

A. That's right.

Q. The manager of the claims department for Northern California?

A. Assistant to the superintendent.

Q. Superintendent of claims? A. Yes.

Q. Now, did you have jurisdiction over the claims that came in for Northern California?

A. That is right.

Q. And that would include Richmond, California; is that right? A. That is correct.

(Testimony of William R. Hunt.)

Q. Now, I will ask you whether or not some time in November of 1947 a proof of loss was filed by a Mrs. Wilbur Mehlin notifying you that an accident had occurred? [53]

A. That is correct. I think it was on November 3 it was reported. That's correct, November 3, 1947.

Q. Mr. Hunt, I will show you what purports to be a Proof of Loss with the signature Mrs. Wilbur M. Mehlin, and I will ask you if that is the proof of loss which was filed with your company on or about the 3rd day of November, 1947?

A. Yes, this is the one; yes.

Q. And from that proof of loss did you get notice to the effect that an accident had occurred?

A. Yes, this was the first notice we received.

Mr. Heafey: At this time, if the Court please, we offer this proof of loss in evidence and ask that it be marked defendants' first number.

Mr. Boyd: Your Honor please, we have no objection to the proof of loss being offered for the purpose of showing that the company received notice of the accident. However, the proof of loss itself contains other matters that we think are self-serving and hearsay.

Mr. Heafey: Will you point it out to me?

Mr. Boyd: We will stipulate, your Honor, that they received notice on November 3, 1947, if that is the purpose it is being offered for.

Mr. Heafey: That is the purpose, your Honor,

(Testimony of William R. Hunt.)

to show that on the 3rd day of November, 1947, notice was given by Mrs. Wilbur Mehlin, 1106 Main Street, Apartment H, to the effect that [54] an accident had occurred on October 31, 1947, at approximately eight o'clock in the evening in the city of Richmond.

Mr. Boyd: Stipulate, your Honor, that may be—stipulated that they received notice at that time.

Mr. Heafey: Counsel, there is another part that I want.

Q. Now, I will show you this proof of loss, Mr. Hunt, and I will ask you whether or not anything on that proof of loss stated with whose permission the car was being driven at the time of the accident?

Mr. Boyd: Your Honor please, we object to it, calls for hearsay. We don't have the right to cross-examine the parties that alleged to have made the statement on the so-called proof of loss. We don't think it is admissible, entirely self-serving.

Mr. Heafey: It goes to the purpose as to what notice the company had, your Honor.

Mr. Boyd: They had notice of the accident, your Honor.

Mr. Heafey: We want to know what notice as to who was driving the car and with whose permission.

The Court: I will allow it on account of the allegations of estoppel and waiver.

The Witness: The proof of loss says that the car was driven by Duane Claggett and driven with the permission of the wife.

(Testimony of William R. Hunt.)

Q. (By Mr. Heafey): And that was stated on the face of the proof of loss, is that right? [55]

A. That's right.

Q. Is that proof of loss signed by someone?

A. It is signed on the back by Mrs. Wilbur M. Mehlin.

Q. I see. Mr. Hunt, did you subsequently have any conversations with an attorney by the name of Augustus Castro with reference to this case?

A. Yes, I did. I had at least one, possibly two.

Q. And do you recall when the first conversation was that you had with him?

A. Well, I can give you an approximate date on that, I think. Should have marked that—I have a memorandum here, you don't have the approximate date there, do you?

Q. Well——

Mr. Bledsoe: I think you have it marked, Mr. Hunt.

Mr. Heafey: January 28, 1948, I believe, according to the testimony, Mr. Castro.

The Witness: I have a memorandum in the file here, January 28, 1948, at the time I had a discussion with attorney Castro.

Q. (By Mr. Heafey): Well, will you give us the substance of that discussion, please?

A. Mr. Meyers, the superintendent of claims, referred the file to me, because suit had been filed and asked me to get a stipulation to protect our time and also to discuss possible settlement with Castro to see what could be done. [56]

(Testimony of William R. Hunt.)

Q. Then did you discuss the matter of settlement with him at that time?

A. I asked him, Mr. Castro, what he had in mind, what he would recommend to his client. He said he might recommend a figure of \$9,000 and I told him at that time we felt the figure was out of line, and after discussing the matter with Mr. Meyers, made an offer of \$7,500.

Q. And did you subsequently have another conversation with Mr. Castro?

A. Well, I don't recall having another conversation with him. I don't have a memorandum in the file covering it.

Q. You don't recall ever calling Mr. Castro on or about the 5th day of February, 1948?

A. Well, I didn't call him; he might have called me.

Q. I see. Well, there is a possibility that conversations could have occurred on or about that time by telephone?

A. Possible.

Q. And you wouldn't have made a notation of that?

A. I wouldn't have made a notation on the file.

Q. It is possible in that conversation you discussed the matter of settlement, is that right?

A. That is right.

Q. Was the file subsequently referred to your attorneys?

A. Yes, it was.

Q. Now, prior to the time the file was referred to the attorneys, [57] did you assign the file to some one for investigation?

(Testimony of William R. Hunt.)

A. Yes. Originally the file was assigned to John Dennis, one of our traveling adjustors, for investigation.

Q. I see. Now then, did Mr. Dennis take a statement from Duane Claggett, the driver of the car?

A. Yes, he did.

Q. And have you that statement in your file?

A. I don't know if we have the original or not. The original may be in Mr.——

Q. The original——

A. (Continuing): In Mr. Bledsoe's file. Here is a copy of it. Taken November 7, 1947. It is a two and one half page statement.

Q. I will show you, Mr. Hunt, what purports to be the original statement signed by Duane R. Claggett, and will you refer to that for a moment, please. What is the date of that statement?

A. November 7, 1947.

Q. And that statement was obtained by one of your adjustors, was it?

A. This was obtained by adjustor John Dennis.

Q. Will you refer to that statement now and tell me if there is any mention in the statement concerning permission to drive the automobile and with whose permission Mr. Claggett was driving the automobile at the time of the accident?

Mr. Boyd: Your Honor please——

The Court: Separate those two, whether there is any [58] statement in there concerning permission.

(Testimony of William R. Hunt.)

Mr. Heafey: Permission?

Mr. Boyd: Your Honor please, to save time we will stipulate that the entire statement may be introduced into evidence at this time. No objection to any parts being separated.

The Court: All right. Is that satisfactory?

Mr. Heafey: I will tell you the rest of the statement has to do with the facts of the accident, not material here. The only part we wanted was the part concerning whether or not he had permission to drive the car from the named insured.

Mr. Boyd: I think, your Honor, it is purely hearsay. We will let the whole thing go in for what it may be worth, but for any parts we object on the ground it is hearsay. We don't know what was asked by the adjustor that took it.

Mr. Heafey: Goes to the notice of the company.

The Court: At any rate, I understand they already consented for the whole thing to go in.

Mr. Heafey: That is correct. I will read the statement to the jury.

“November 7, 1947. Statement of Duane Richard Claggett, Age 20, 1106 Maine Avenue, Richmond, California:

“I am presently unemployed, was last employed by J. T. Thorpe, Brick Contractor, on a job at the Associated Oil company Refinery at Avon, California. I am single, reside with my uncle, Carl G. Claggett. [60] My parents reside at Mora, Minnesota.

(Testimony of William R. Hunt.)

“On October 31, 1947, I borrowed Mrs. Wilbur Malin’s 1936 Ford Coach, Nebraska license 2-8671, and was driving it in an easterly direction along Access Highway when I struck a pedestrian. I had borrowed the car from Mrs. Malin to take a girl acquaintance to a dance in Oakland. I was alone in the car when the accident happened.

“The accident happened at approximately 8:00 p.m. at the intersection of 47th Street and Access Highway. I was eastbound in the southernmost of the eastbound lanes. The pedestrian was crossing Access Highway from north to south in the cross-walk at the east side of the intersection. When I first saw the pedestrian he was standing almost precisely on the double white strip dividing east and westbound traffic. I am not certain whether he was within the boundary of the cross-walk. My car was then approximately 75 feet west of the cross-walk. An instance after I saw the pedestrian in the middle of the highway, not believing that he had observed my approach, I sounded my horn to warn him. The pedestrian continued along his course and I removed my foot from the accelerator pedal. I thought there would be time for me to pass in front of the pedestrian before he entered the southernmost lane and I did not, therefore, [60] apply my brakes until an instant later when he apparently heard my horn, turned to look in my direction, apparently misjudged my speed and commenced to run. As the car was then not more than

(Testimony of William R. Hunt.)

30 feet from the pedestrian it was too late to swerve into the middle lane for southbound traffic so I swerved to the right and slammed on my brakes. My car then commenced to skid, partly on and partly off the highway, struck the pedestrian and carried him up the highway for a distance later determined by the police to have been 90 feet. The point of impact was approximately 10 feet east of the cross-walk and the pedestrian must have been at the very edge of the pavement when he was struck because I had one wheel on and one wheel off the highway at the moment of impact and the point of contact on the car was the middle of the front grill.

“When my right wheels passed onto the gravel at the edge of the highway the car began to slide counter-clockwise in an arc and came to rest facing in a general northwesterly direction partly in each of the two eastbound lanes. The pedestrian’s body was lying at the edge of the pavement approximately two or three feet closer to the cross-walk than the front of my car. I immediately drove the car off the highway and parked it.

“I have read the foregoing statement and it is, to the best of my knowledge, true and correct. Signed Duane R. Claggett.” [60-a]

Q. (By Mr. Heafey): Now, I will ask you, Mr. Hunt, whether or not you have any statement in your file that was ever taken from Mrs. Wilbur Mehlin up to the present time?

(Testimony of William R. Hunt.)

A. There was none that I know of.

Q. And when was the first time that you notified the insurance company under your policy—Wilbur Mehlin, that an accident had occurred and a claim had been made?

A. The first time I notified him?

Q. Yes. Does your file—

A. I don't recall we notified him until after suit was filed and we sent him a customary suit letter.

Q. What was the date of that letter? First of all, what was the date the suit was filed, when did you get notice of the pendency of the action?

A. Well, we sent the file and forms of complaint to Dana, Bledsoe & Smith's office in February, February 6, so we were notified at that time, possibly two or three days before.

Q. Well, the action had been filed some time in December, had it not?

A. Yes, it had been filed, but apparently service hadn't been made. We didn't receive it until later.

Q. You referred the file to Dana, Bledsoe & Smith on February 5th? A. February 6th.

Q. Of 1948? [60-b]

A. Of 1948, that's right.

Q. Now, will you refer to your file as to when you notified the insured with your form excess letter?

A. That should follow at the same time. I don't see it in here. I recall now—you see, this is a

(Testimony of William R. Hunt.)

Nebraska policy and of course we didn't have the master file here, and I recall that we communicated with Mr. Gibson with reference to notifying the policy holder and I am not sure, but I think they notified him back there.

Mr. Boyd: Just a second, Mr. Heafey. Your Honor please, I will ask that be stricken that it could or might be or something else.

The Court: The statement "I am not sure but I think" should go out and the jury will disregard it.

Q. (By Mr. Heafey): Who was Mr. Gibson?

A. Mr. Gibson is superintendent of claims for Nebraska; W. W. Gibson.

Q. And was a report made to that office that an accident occurred involving a policy holder from Nebraska?

A. We immediately notified and we made and requested coverage immediately.

Q. Confirmation of coverage? A. Yes.

Q. Will you look now and see if you can find any notification you may have sent from here to the assured? It should be marked, [61] we went over those this morning.

A. That is what I thought.

Q. Maybe some place in the yellow paper, yellow slips that went in there.

A. Here it is. Notified Melvin Mehlin on April 15, 1948, that we had forwarded the file to Dana, Bledsoe & Smith.

(Testimony of William R. Hunt.)

Q. Is that a customary form letter that goes with—— A. Yes.

Q. Amount prayed for is in excess of the policy limit?

A. The last paragraph states that the amount claimed is in excess and afforded by his protection and notified him if he wished to employ an attorney of his own it was perfectly all right for him to do so.

Q. And the date of the letter was April——

A. April 15, 1948, sent by registered mail.

Q. Was that sent from the Berkeley office or from the Nebraska office?

A. No, this was sent from the Berkeley office, signed by Mr. Meyers, carbon copy was sent to superintendent Gibson at Lincoln, Nebraska.

Mr. Heafey: Your Honor, I think we can save a little time if we take a recess at this time and I can have the documents ready for his reference after the noon recess.

The Court: All right, we will take a recess at this time. Ladies and gentlemen, this Court will have to adjourn at 3:30 [62] this afternoon on account of another engagement which I have to keep, so we will meet at 1:30 unless that is not agreeable to any of the jurors. We will meet at 1:30 today instead of 2:00 o'clock and adjourn at 3:30.

Bear in mind, ladies and gentlemen, the admonition I have heretofore given you.

(Thereupon an adjournment was taken until 1:30 p.m. this date.) [62-a]

Thursday, January 5, 1950, 1:30 P.M.

WILLIAM R. HUNT

resumed the stand.

Direct Examination
(Continued)

By Mr. Heafey:

Q. Mr. Hunt, when was it the State Farm received notice for the first time that this automobile had been taken out of the state of Nebraska without the permission of the named insured?

Mr. Boyd: Well now, if your Honor please, we object to that question, particularly the form of it. There is no evidence in this case so far it hadn't been taken out with the permission of the named insured. As a matter of fact, we think it had been what was reported out here, that has been asked and answered, received notice that the accident, immediately afterward, or two or three days after the accident.

The Court: I can't agree with you there. The testimony read from the depositions this morning proved, tended to prove, I should say, Mr. Mehlin didn't know it had been taken out and that his wife took it way without notifying him, so I think that I will have to overrule that objection.

Mr. Castro: May we have an objection on the further grounds it calls for the opinion and conclusion of the witness and not for a fact.

The Court: Well, you can reframe the question as to whether received any notice. [63]

(Testimony of William R. Hunt.)

Q. (By Mr. Heafey): Mr. Hunt, did the State Farm Mutual receive any notice at any time up until the present time to the effect that the automobile that was insured under your policy had been taken out of the state of Nebraska without the permission of the named insured?

A. Yes, first notified to that effect the early part of July.

Q. And who notified you at that time?

A. Attorney Leighton Bledsoe.

Q. One of your attorneys?

A. Phoned me and told me what he had found out from the attorney in Lincoln, Nebraska.

Mr. Boyd: Your Honor, I object to what the attorney found out from another attorney; not admissible.

The Court: I will strike that out, "He found out."

Q. (By Mr. Heafey): So that it was some time in July of 1948, the early part of July, 1948, that you first had notice to the effect that the automobile had been taken out of the state of Nebraska without the permission of the named insured?

Mr. Boyd: May we have him specify the first time this particular witness had notice, your Honor, whether he had knowledge of what went on in Nebraska?

Mr. Heafey: Well, I will get to that next.

The Court: I think——

The Witness: Received the phone call from Mr. Bledsoe on July 8. [64]

(Testimony of William R. Hunt.)

Q. And that was when you were notified?

A. That is right.

Q. To the effect that he had heard it had been taken out of the state of Nebraska without the permission of the named insured?

A. And unlawfully out of the state of Nebraska, too.

Mr. Boyd: Your Honor please, I think that that last should go out as a voluntary statement of the witness, purely a legal conclusion as to whether or not it was unlawful. As a matter of fact, the charge was dismissed.

The Court: I think that is true.

Mr. Heafey: We have no objection.

The Court: The words from "unlawful" will be stricken out; disregard them.

Q. (By Mr. Heafey): Now, after receiving that notice, Mr. Hunt, what action, if any, did your company take?

A. We sent a teletype message to our office in St. Paul asking them to thoroughly investigate and to obtain a non-waiver agreement from the insured.

Q. Will you state whether or not a non-waiver agreement was subsequently obtained?

A. Yes, it was.

Q. From whom was that obtained?

A. It was obtained from Duane R. Claggett.

Q. What was the date of that non-waiver agreement? [65]

A. The next day, July 9.

Q. Where was that non-waiver agreement taken from Claggett, in what state?

(Testimony of William R. Hunt.)

A. In Nebraska.

Q. And the date of it is July 9, 1948?

A. That is correct.

Q. Will you kindly read the wording of that non-waiver agreement?

Mr. Boyd: If your Honor please, I would like to see the non-waiver agreement.

Mr. Heafey: It is a regular form. Can you take it out of the file?

Mr. Boyd: Your Honor please, we want to object to the introduction of the contents of that memorandum in evidence. It is purely hearsay, no foundation laid as to the taking of the agreement, and it is just full of legal conclusions, not only opinions of the State Farm Mutual but legal conclusions as to what their rights have been, as to what they say is not the test in this case as to what the law is.

Mr. Heafey: I think under the estoppel charge in our complaint, your Honor, we are entitled to show what action the company took with reference to obtaining a non-waiver agreement before defending this action.

Mr. Boyd: Absolutely no foundation laid, as to who signed it, who was there, what was said. [66]

The Court: Well, I don't think that is of any particular consequence, because here in a sense you are claiming Claggett's rights under the policy.

Mr. Boyd: That is correct, your Honor.

The Court: And therefore it is admissible in con-

(Testimony of William R. Hunt.)

nection with their denial, if there is any denial.

Mr. Castro: There is no evidence of Claggett's signature.

The Court: No foundation laid in that respect.

Q. (By Mr. Heafey): Are you acquainted with Mr. Claggett's signature?

A. No, I think not. Mr. Dennis might be.

Q. Was Mr. Dennis the one who took the statement from him? A. You mean——

Q. The statement that we have in evidence here this morning, got in evidence?

A. No, he took the statement of Mrs. Mehlin. Mr. Mehlin's statement was taken in Nebraska.

Q. I am referring now to the statement that was read in evidence this morning taken from Duane Claggett right after the accident occurred. Was that taken by Mr. Dennis?

A. That's right, it was taken by Mr. Dennis.

Q. All right.

Mr. Heafey: I will introduce this when Mr. Dennis testifies, your Honor. [67]

Q. Now, after you had received notice to the effect that this car had been taken out of the state of Nebraska without the permission of the named insured, did you subsequently obtain statements from the named insured and his wife?

A. Yes, we did.

Q. And when were those statements taken?

A. August 25, 1948.

Q. And where were those statements taken?

(Testimony of William R. Hunt.)

A. They were taken back in Nebraska.

Q. And by whom were they taken?

A. They were taken by our attorneys back there, I presume.

Q. What is his name, who asked the questions? You can tell by who asked the questions, the name of the person.

A. Direct examination by Mr. Healey.

Q. And is Mr. Healey of the law firm that took the statement for you in Lincoln, Nebraska?

A. Yes, I'm sure that is correct.

Q. Can I see that, please? Now, Mr. Hunt, are these the first statements that were taken from either Mr. or Mrs. Mehlin with reference to the facts surrounding the taking of this automobile out of the state of Nebraska? A. That is correct.

Mr. Boyd: Objected to as calling for a conclusion of the witness, your Honor, not for a fact.

The Court: If he knows. [68]

Q. (By Mr. Heafey): From an examination of your file and from your knowledge of the matter thereof, these are the first statements that were taken concerning those matters?

A. That is absolutely correct, yes.

Mr. Heafey: I am going to offer these statements in evidence.

Mr. Boyd: Your Honor please, these statements, according to the admission of the witness, were taken in August, 1948, after the case had been in their hands for a period of ten months after they had offered settlement, after they had——

(Testimony of William R. Hunt.)

Mr. Heafey: Objecting?

Mr. Boyd: Those are the grounds of my objection, purely hearsay, not binding on this plaintiff under the doctrine of estoppel.

The Court: I don't think they are, either, but the legal effect of those statements I assume is to the same effect as the testimony of Mr. and Mrs. Mehlin.

Mr. Heafey: Exactly, your Honor.

The Court: And is the only purpose of introducing those statements, would be to show that was the first time that the insurance company found out.

Mr. Heafey: Precisely.

The Court: Tending to prove that they hadn't had any permissive use of this automobile, so I think the entire—I wouldn't want to allow those statements in evidence, but I think [69] the witness could be asked if, so far as his part of the company is concerned, whether that was the first notice that they had.

Q. (By Mr. Heafey): Mr. Hunt, after these statements were taken from Mr. and Mrs. Mehlin in Lincoln, Nebraska, on the 25th day of August, 1948, and were referred out here to your office, was that the first information you had of the details concerning the taking of this automobile out of the state of Nebraska? A. That's right.

Q. Prior to that time I believe you testified that in the early part of July, or on July 6 or 7, that Mr. Bledsoe had informed you to the effect that he had heard it had been taken out?

(Testimony of William R. Hunt.)

A. That's right.

Q. And was it after that you had these statements taken?

A. We didn't take a statement from the assured previous to that time, because he wasn't in the car and knew nothing about the accident.

Mr. Boyd: I move to strike that as self-serving.

The Witness: We presumed there was permission.

Mr. Boyd: Just a moment, that is non-responsive.

The Court: Yes, it is a voluntary statement, will be stricken, and the jury instructed to disregard it.

Q. (By Mr. Heafey): Mr. Hunt, will you refer to your file, please, and tell the jury just what coverage came under the policy in this matter? [70]

Mr. Boyd: Calls for an opinion and conclusion of the witness, the very point at issue in this case, if your Honor please.

Mr. Heafey: No, I want——

The Witness: I have a copy of that and the coverage——

Mr. Heafey: I wanted to inquire as to whether or not there was collision insurance here. We want to show what the coverage was on this particular car.

The Court: Wouldn't that be in the policy?

Mr. Boyd: The policy is not in evidence.

The Court: The policy is in evidence, unless there is some supplemental agreement.

Q. (By Mr. Heafey): Mr. Hunt, can you tell

(Testimony of William R. Hunt.)

from looking at the policy?

A. Is this the original, Mr. Mehlin's copy?

Q. This is a certified copy of the original. Can you tell from examining that as to whether or not there was any collision insurance on that automobile?

A. No, sir, there wasn't. No collision coverage.

Q. All right. Are you acquainted with a Mr. Gripenstraw?

A. Yes, I am.

Q. What is his full name?

A. Louis Gripenstraw.

Q. Is he employed by the State Farm Mutual?

A. Yes. [71]

Q. In what capacity?

A. Traveling adjustor.

Q. Does he work under you out of the Berkeley office?

A. That is correct.

Q. And what are his duties as an adjustor?

A. To investigate accidents, take statements, obtain the evidence and to negotiate settlements if the facts prove it is a case up to, up to a certain amount. His authority is limited.

Q. What is the limit of his authority?

A. \$3,000.

Q. Is that the limit of all adjustor authorities?

A. That's right.

Q. Does he or any adjustor working out of your office have any authority to waive any provisions of a policy?

Mr. Boyd: Your Honor please, that is a ques-

(Testimony of William R. Hunt.)

tion, I think, is purely a question of legal conclusion.

The Court: I think so.

Mr. Heafey: I will withdraw the question.

The Court: Sustained.

Q. Are you acquainted with a Mr. Dennis?

A. Yes.

Q. Does he work out of your office?

A. Yes, he does.

Q. What is his full name?

A. John Dennis.

Q. And in what capacity does he work in your office? [72]

A. The same capacity as Mr. Gripenstraw, traveling adjustor.

Q. And has the same authority as Mr. Gripenstraw?

A. Exactly the same, yes.

Mr. Heafey: You may cross-examine.

Cross-Examination

By Mr. Boyd:

Q. Mr. Hunt, how long have you been adjusting claims, sir?

A. Well, I worked as an outside adjustor for several years. I have been with the State Farm for sixteen and a half years.

Q. I take it then that you are entirely familiar with the claim adjusting business, are you, sir?

A. Well, I should be.

Q. I think so. You know, do you not, Mr. Hunt,

(Testimony of William R. Hunt.)

that the first question that any claim adjustor ever determines when a loss is reported is whether or not the policy covers the accident; is that not true, sir?

A. Well, just what do you mean? You're speaking about coverage or not. Yes, I should never investigate a case until I find out his coverage, verify that, that is right.

Q. And the first thing that happened in this case right here when this accident report came in was that you verified the coverage, did you not, sir?

A. We verified the fact the car was insured for Mr. Mehlin, yes.

Q. Well, didn't you know the day this accident was reported Mr. Wilbur Mehlin was a resident of Lincoln, Nebraska? [73]

A. We knew it after we had wired for coverage, yes.

Q. That was in November of 1947, was it not?

A. November 3, that is right.

Q. And you knew that when Mrs. Mehlin came in your office to report that accident that she was residing in Richmond, California, did you not, sir?

A. Yes.

Q. And you knew that when you sent your adjustor out to take the statement from Mr. Claggett that he had obtained the permission to use the automobile from Mrs. Mehlin, did you not, sir?

A. Yes, we knew that he had her permission. We never questioned that.

(Testimony of William R. Hunt.)

Q. You didn't question the coverage at all, did you?

A. Not at that time. We had no reason to because Mrs. Mehlin said she was the wife out here for a visit and we assumed that being the wife she had his permission. We didn't question it.

Q. And as a matter of fact, you were so certain that Mr. Claggett was covered under your policy that you authorized your adjustor to come over and offer Mr. Castro \$7500, didn't you?

A. At the time we started to settle it, we assumed she was driving the car with the policy holder's consent, that he was driving it with her consent. I will answer that by saying——

Q. That question should be answered yes or no, and then explain it. [74]

The Court: Answer it yes or no, if you can, and then explain it.

A. Yes, at that time we thought he was covered, yes.

Q. (By Mr. Boyd): And never even questioned the coverage sufficient to request your Lincoln, Nebraska, office to check with your named insured, did you?

A. No, we didn't check at that time because we assumed that the information we had gotten from Mrs. Mehlin was correct.

Q. The information that you had from Mrs. Mehlin was merely to the effect that Mr. Claggett was driving with her permission?

(Testimony of William R. Hunt.)

A. She didn't——

Q. Is that the information?

A. She told us she had given him permission to drive the car, that is right.

Q. That is all the information you had when you authorized your adjustor to authorize \$7500?

A. That is all she gave us. She never, when Mr. Dennis questioned her, she never gave us the true facts.

Mr. Boyd: I will ask that go out, if your Honor please, as to what Mr. Dennis said and something else.

The Court: Yes, I think I will strike that out.

Q. (By Mr. Boyd): Isn't it a fact, Mr. Hunt, that at the time you authorized your adjustor to offer \$7500, the only information that you had had or requested from Mrs. Mehlin was whether or not she had authorized Mr. Claggett to drive [75] that car?

A. That's correct, yes.

Q. Yes. Now, after this suit was filed, Mr. Claggett came into your office, did he not, with a summons and complaint?

A. I don't know how the summons and complaint got in there; I couldn't say.

Q. Doesn't your file show how it came in there?

A. It might; I don't know. I didn't notice whether it came in or was brought in or given to an agent. They come in many ways.

Q. And would you look at the file and tell how the summons and complaint came into your office?

(Testimony of William R. Hunt.)

A. We don't keep a record of that, as a rule. All we are interested in knowing is when the service was made. Who brings it in, that is immaterial.

Q. You don't know how this summons and complaint was brought into your office? A. No.

Q. Do you know what date it came into your office?

A. We have summons and complaint come in quite often through the mails, sometimes brought in by an agent. We don't pay much attention how they——

Q. I imagine they do, but does your file show how this summons and complaint came into your office?

A. I wouldn't know without taking an hour to go through it.

Q. You have been through your file before you testified, or [76] haven't you, Mr. Hunt?

A. If you want to take time off to look through——

Q. Didn't you go through the file this morning before you testified?

A. Yes, I went through it. In fact, on my way over here in the car.

Q. Didn't you go through it again at noon?

A. No, I just had a discussion with Mr. Leighton, I didn't go through the file at noon, no.

Q. What date was the summons and complaint served on Mr. Claggett?

A. I haven't the slightest idea.

(Testimony of William R. Hunt.)

Q. Does your file show that?

A. I wouldn't know; it might.

Q. Can you look and tell us the date that it was served, sir?

Mr. Bledsoe: I have it here, if you want it. I have the summons. You want a stipulation on it, counsel?

Mr. Boyd: I would like to know what the file shows.

Mr. Bledsoe: My file has it.

Mr. Boyd: You have the——?

Mr. Bledsoe: Yes.

The Witness: I don't have the original complaint here, anyway.

Mr. Bledsoe: Served 12/27/47.

Mr. Boyd: December 27, 1947, according to your attorney, [77] Mr. Hunt.

Mr. Bledsoe: That is probably correct.

The Witness: I wouldn't know.

Q. (By Mr. Boyd): And did you, or anyone in your office, have any conversation with Mr. Claggett after the summons and complaint were filed?

A. I doubt it, because we had his statement, we already had his statement, and the file was referred to Mr. Leighton's office and any further conversation with Mr. Claggett would be had by Mr. Bledsoe.

Q. When was the file referred to Mr. Bledsoe?

A. That date is in here some place. April 15, 1948, apparently.

Q. Was referred to Mr. Bledsoe——

(Testimony of William R. Hunt.)

A. No, that is the date we—no, it was before that.

Mr. Boyd: Do you have that date, counsel?

Mr. Heafey: A letter of transmittal here some place. February 6.

Mr. Boyd: February 6.

Q. Did you or any of your adjustors have any communications or conferences with Mr. Claggett between the time that the summons and complaint was served in December of 1947 until you referred it to Mr. Bledsoe in February of 1948?

A. I don't think so. I wouldn't know of any if we did.

Q. Well, as a usual manner in the handling of claims, when a customer is sued for several thousand dollars, don't you usually [78] talk to the man that has been sued?

A. Well, we had his statement and it was referred to our attorney's office and they take care of it from there on.

Q. Isn't it customary for the adjustor himself to tell the insured who has been sued that a certain attorney will defend them, or what do you do about that?

A. We don't tell them in person, we notify them by mail, which we did in this case.

Q. Fine. Now, when did you notify Mr. Claggett by mail acknowledging receipt of the summons and complaint and telling him what to do?

(Testimony of William R. Hunt.)

A. We notified our assured on April—I gave you that date a minute ago.

Q. That is correct. A. April 15, wasn't it?

Q. Yes. When did you notify Mr. Claggett, the man that was served with summons and complaint, as of what date?

A. Mr. Claggett is not the named insured, not duty bound to notify him.

Mr. Boyd: I ask that go out, whether duty bound or not.

The Witness: Notified our assured on April 15, 1948, sent a carbon copy to our attorney and to our Nebraska office.

Q. Well, Mr. Hunt,—

A. But we didn't notify Mr. Claggett as far as I know, because he is not insured with us. [79]

Q. Well, Mr. Hunt, when a man who is sued and brings a complaint into your office for something of approximately \$100,000, is it your testimony that you don't even acknowledge receipt of the summons and complaint, or confer with him, or anything?

A. The policy holder—

Mr. Heafey: That is objected to as assuming something not in evidence, the fact that Mr. Claggett brought this complaint into them.

The Court: I think it is a little bit argumentative.

Mr. Boyd: Let me reframe the question.

Q. Did you ever have any communication of any kind with Mr. Claggett after this summons and

(Testimony of William R. Hunt.)

complaint was served some time in December, 1947, up until July?

A. I didn't; I don't think anyone in our office did, but I presume our attorney's office did.

Q. You have the file there. Does your file refer to any copies of letters sent to Mr. Claggett?

A. None, I don't think there are any in here to Mr. Claggett.

Q. Is that your complete file, Mr. —?

A. Yes.

Q. You notified Mr. Mehlin that the suit was for an amount exceeding his policy limits, did you not?

A. Yes.

Q. And is it your testimony you didn't notify Mr. Claggett, the only man who had been served, that the amount of the suit was [80] for an amount exceeding your policy limit?

A. That is not material. We don't insure——

Mr. Boyd: I will ask that be stricken and the witness directed to answer the question.

The Court: The previous answer may go out. Read the question.

(Question read by the reporter.)

A. In case of litigation we notify our policy holder only.

Mr. Boyd: Your Honor please, may I have a direct answer to that question?

The Court: Answer directly. Is it your testimony you didn't notify Mr. Claggett?

The Witness: No, I am sure we didn't.

(Testimony of William R. Hunt.)

Q. (By Mr. Boyd): May I see your file, please? And did you at any time notify Mrs. Mehlin that an action had been filed naming Mrs. Mehlin as a defendant for an amount exceeding her policy limit?

A. Not to my knowledge.

Q. The only one that you notified was Mr. Mehlin? A. That's right.

Q. Now, Mr. Hunt, at the time that you first contacted Mr. Claggett, there was no doubt in your mind at that time but that he was operating the car with Mrs. Mehlin's permission, is that true?

A. That is right, with her permission; that is right. [81]

A. And there was no doubt in your mind at that time that the policy covered Mr. Claggett, was there?

A. As far as we knew at that time, that is correct.

Q. And during the time that you were negotiating with Mr. Castro through your adjustor, there was no doubt in your mind but that the policy covered Mr. Claggett, was there?

A. No, I don't think we would have had negotiations if there was any doubt in our minds.

Q. If Mr. Gripenstraw stated to Mr. Castro that the automobile was being operated with the permission of the owner at the time that he was negotiating, that would have been with your full approval, would it not, sir?

A. I am sure Mr. Gripenstraw didn't make that statement.

(Testimony of William R. Hunt.)

Q. If he had made that statement you certainly would have had no objection to it?

A. I could have objected; I wouldn't be bound by his statements.

Q. If you had been asked the question by Mr. Castro as to whether there was any question as to the permissive use of the automobile, you would have told him there was no question?

A. At that time I would have assumed that coverage was all right at that time, yes.

Q. So if Mr. Gripenstraw did make that statement, why, you would have had no objection to him making it?

Mr. Heafey: That is objected to as incompetent, irrelevant and immaterial, whether or not he objected to it. [82]

The Court: Yes, I think so.

Q. (By Mr. Boyd): Now, Mr. Hunt, you obtained the facts from Mr. Claggett as to how this accident occurred, did you not?

A. Mr. Dennis did, yes.

Q. And that was reported to you?

A. That is right.

Q. And you knew that the deceased had been struck in a crosswalk and knocked some 90 feet, is that correct?

A. I am not very familiar with the facts now. I don't remember for sure just what——

Mr. Heafey: The statement doesn't indicate that, counsel.

(Testimony of William R. Hunt.)

Q. (By Mr. Boyd): The statement has been read in evidence, but you went over the file and knew what the facts were, did you not?

A. Yes, Mr. Meyers did at the time. I didn't go over the file when it first came in.

Q. Mr. Hunt, as I understood you to say, the company offered \$7500 in settlement, is that correct? A. That is correct.

Q. And how did you determine the value of that case as \$7500?

A. Well, we didn't feel it was a hopeless case, felt there was some defense, contributory negligence, but it was a death case. Where that element is involved, thought it better to settle.

Q. Was there any question in your mind but that the plaintiff's damages far exceeded your policy limit of \$10,000? [83]

A. It was a case of liability, if our man was entirely at fault and no negligence on the part of the deceased, it was a case that would far exceed our limits.

Q. And isn't it a fact, Mr. Hunt, that the only reason that you withheld your offer to \$7500 was the fact that you knew that the plaintiff couldn't get more than \$10,000 because of your policy limit?

A. No, if we had felt it was a clear case of liability we would have offered more than \$7500 on a ten limit. We felt there was some defense in it. This man was running across the street, wasn't looking out for his safety. Apparently from our

(Testimony of William R. Hunt.)

investigation we felt that it was about a 50-50 case. We felt we had 50-50 to win.

Q. What is your limit of authority?

A. My limit is the same. No one in my company has any authority over \$3000.

Q. I beg your pardon?

A. No one in my company has any authority to settle a case over \$3000. If you want authority above that you have to get it from the claims committee, which is composed of five men who meet four times a week and they place the value on the claims.

Q. And was this case submitted to your claims committee?

A. Oh, yes, all claims over that amount have to go to the committee.

Q. That was back in Bloomington, Illinois? [84]

A. No, we have our own committee here in Berkeley.

Q. And your claims committee authorized the offer of \$7500? A. That's correct.

Q. What reserve were you carrying on this case, Mr. Hunt?

A. Our reserves are always much higher than what we ever expect to pay on them because our reserves have to include adjusting expense, attorney's fees, and all the other expenses which are included beside any possible settlement, so we usually carry a reserve of at least one third more than what we think the claim is worth. In other words, for a

(Testimony of William R. Hunt.)

claim we think we might settle for seven, we put \$10,000 on it.

Q. But in this particular case you carried a damage reserve of \$10,000, did you not?

A. Practically all death cases are opened up with a maximum reserve.

Q. And that is the reserve that you carried in this case?

A. I haven't got the outside file, I will have to see it.

Mr. Castro: I have clipped the pages, Mr. Hunt.

Q. (By Mr. Boyd): The page is clipped there; will you take a look at it, please?

A. Yes, we were carrying ten.

Q. And during the months of November, December of 1947, January, February, March, April, May and June of 1948, you never questioned the company's coverage for Mr. Claggett, did you?

A. We didn't question the coverage until we found out the truth [85] of the situation from Nebraska.

Q. And you never made any effort to contact your named insured, Wilbur Mehlin, during those same months, did you?

A. Well now, you see our Nebraska office was notified immediately, and received a copy of the file; they received copies of everything as they came into us, and they had a complete file of all those. It is very possible our Nebraska office contacted

(Testimony of William R. Hunt.)

him, it would be up to them to do it. They have the master file.

Q. In other words, it is the duty of the company of the office where the named insured lives, where the policy is written? A. That is right.

Q. To contact the company?

A. That is right.

Q. The insured?

A. Any need for contact they should make it there.

Q. So regardless of whether they did or did not contact the insured, so far as you know the Nebraska office never questioned the coverage of this case until July of 1948, is that correct?

A. They probably didn't; I am sure they would have notified us.

Q. Any question in their mind, they would have immediately contacted you?

A. Yes, I think they would.

Q. And if there had been any question in your mind about the coverage, you would immediately have contacted their office, [86] would you not, sir?

A. Yes, we would.

Mr. Boyd: Now, I have no more questions at this time. I would like to have an opportunity to take a look at that file. I think counsel has some additional witnesses, if the witness may be excused for the time being.

The Court: Unless there is some redirect.

(Testimony of William R. Hunt.)

Redirect Examination

By Mr. Heafey:

Q. Mr. Hunt, when are reserves set up on these claims, when they come in?

A. Set reserves up immediately. On this particular file we set up \$1500 when we first opened the file.

Q. I see.

A. We have to set up a reserve immediately. It is adjusted later on after we obtain all the information.

Q. Now, if the Nebraska office of the company interviews witnesses and takes statements, do they forward copies of the original statements out here if the action is pending out here?

A. If the action is pending out here they would forward the originals.

Q. Is there anything in the file that indicates that the Nebraska office at any time up until this deposition was taken had contacted either Mr. or Mrs. Mehlin?

A. There is nothing in our file that would indicate it.

Mr. Heafey: That is all. [87]

Recross-Examination

By Mr. Boyd:

Q. You're still carrying \$10,000 reserve on this case, are you not?

(Testimony of William R. Hunt.)

Mr. Heafey: That is objected to on the grounds it is incompetent, irrelevant and immaterial.

The Court: Sustain that objection.

Mr. Boyd: That is all at this time.

Mr. Heafey: Mr. Dennis.

JOHN DENNIS

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. John Dennis.

Direct Examination

By Mr. Heafey:

Q. Mr. Dennis, what is your business or occupation? A. Claim adjustor.

Q. For what company?

A. State Farm Mutual.

Q. And for how long a period have you been employed by this company?

A. Just a little under four years.

Q. Were you employed by that company on the 31st day of October, 1947? [88] A. Yes, sir.

Q. And continuously thereafter?

A. Yes, sir.

Q. Is that right? Now, in what capacity were you employed by them?

A. As a claim adjustor.

(Testimony of John Dennis.)

Q. And what are your duties as a claim adjuster?

A. Investigation of accidents and compromising of claims.

Q. I will ask you whether or not a file was referred to you for investigation that involved an accident that occurred on the 31st day of October, 1947, on Access Highway near the city of Richmond, in which a person by the name of Mr. Porter was involved and subsequently died?

A. Yes, sir.

Q. And when did that file first come to your attention, do you know?

A. The first week in November, 1947.

Q. And had a proof of loss already been filed by someone before that file was given to you?

A. Yes, sir.

Q. And who had filed that proof of loss, do you know? A. It was filed by Mrs. Mehlin.

Q. I will show you what purports to be a proof of loss and ask you if you will examine that, please. Was that proof of loss in the file at the time the file was referred to you for investigation? [89]

A. Yes, sir, it was.

Q. Now, did you interview a person by the name of Duane Claggett? A. Yes, sir.

Q. And did you take a statement from him?

A. Yes, sir.

Q. Was that statement signed by him in your presence? A. Yes, sir.

Q. I will show you the statement dated Novem-

(Testimony of John Dennis.)

ber 7, 1948, which purports to be signed by Duane R. Claggett. I will ask you if you took that statement; did you take that statement?

A. Yes, sir.

Q. And was that statement signed by Mr. Claggett in your presence? A. Yes, sir.

Q. Is that his signature? A. Yes, it is.

Mr. Heafey: This statement has already been read in evidence, your Honor.

The Court: Yes.

Q. (By Mr. Heafey): I show you a statement taken from—where was this statement taken?

A. Where?

Q. Yes. A. Taken in Richmond. [90]

Q. I mean the address.

A. Taken at 1106 Main Street, I believe.

Q. Main Avenue, Richmond, is that right?

A. That is right.

Q. Now, did you also interview Mrs. Mehlin?

A. Yes, sir.

Q. And when did you have a discussion with her?

A. Well, it was in the first week in November, the day I went there and took the statement from Claggett.

Q. The day you took the statement from Claggett you talked to Mrs. Mehlin?

A. That is right.

Q. Where was she at that time?

A. She was in the apartment at the address on Main Avenue where I talked to Claggett.

(Testimony of John Dennis.)

Q. And will you tell us what the conversation was you had with Mrs. Mehlin at that time?

Mr. Boyd: Your Honor please, we object on the grounds it is hearsay, what anything Mrs. Mehlin may have told this adjustor. Certainly entitled to a right of cross-examination.

Mr. Heafey: Goes to the notice the company had with reference to the facts as to whether or not she told him that she had taken the car from Nebraska with the permission of her husband.

Mr. Boyd: Your Honor please, it is still hearsay. [91]

The Court: May not be, the question of notice. Limiting it just to the matter of notice?

Mr. Heafey: That is right.

The Court: I will allow it.

Q. (By Mr. Heafey): Will you tell us what the conversation was that you had with Mrs. Mehlin on that question?

The Court: With respect to whether or not she told you she had taken the car from Nebraska without her husband's permission.

The Witness: She did not tell me that.

Q. (By Mr. Heafey): What did she tell you in that connection?

A. Told me she was visiting in California; her husband was at home.

Q. And did you ask her how long she was going to remain? Give me the substance and effect of the

(Testimony of John Dennis.)

questions you asked her and the answers she gave you on that occasion.

A. I asked her first where Mr. Mehlin was. I didn't know where he was, didn't know, and she told me he was at home. She was visiting here in California and staying with friends in Richmond. And I asked her how long she intended to be here and she told me she was uncertain how long her visit would be, and I asked her if she would be, if I could locate her at the address in Richmond if it became necessary. She said yes, as long as she remained there. That is the substance of it.

Q. And did she give you a home address, Nebraska address? [92]

A. Indirectly, yes. I asked her if she still lived at that address and she said yes.

Q. Had you referred to this proof of loss in the file at that time? And I will ask you if there was an address on that proof of loss. A. Yes, sir.

Q. And an address for mailing, and what address was that?

A. 210 North 29th Street, Lincoln.

Q. Lincoln what? A. Nebraska.

Q. Now, did you ask her whether or not this car was being driven with her permission by Mr. Claggett? A. Yes, sir.

Q. Did you talk to her before you talked to Claggett? A. Yes, sir.

Q. Was it at the home where you found Mr. Claggett?

(Testimony of John Dennis.)

A. Yes, sir; that is right. He was there, he was in the vicinity. I think he was outside and she called him in.

Q. I see.

You may cross-examine.

Cross-Examination

By Mr. Boyd:

Q. Mr. Dennis, you didn't bother to take a statement from Mrs. Mehlin, is that correct?

A. No.

Q. The only thing you were interested in was in finding out how [93] this accident occurred, is that not true?

A. That was my first concern, yes, sir.

Q. No question in your mind but that the policy covered Mr. Claggett, was there?

A. No, sir.

Mr. Heafey: That is objected to, incompetent, irrelevant and immaterial as to what was in his mind, your Honor.

Mr. Boyd: Whether it was his duty to find out is certainly material, your Honor.

The Court: I think that calls for a conclusion.

Mr. Boyd: I will reframe the question.

Q. You knew that the car was registered in Lincoln, Nebraska? A. Yes, sir.

Q. Mrs. Mehlin told you that her husband wasn't with her? A. Yes.

Q. Mrs. Mehlin told you that she had been out

(Testimony of John Dennis.)

here and was going to stay for an indefinite time?

A. Yes.

Q. And you still didn't even question Mr. Mehlin? A. Question——

Q. Mr. Mehlin.

A. Mr. Mehlin wasn't there. You mean I didn't question her about him?

Q. Yes.

A. I asked her where he was, is that what you mean? [94]

Q. You didn't ask Mrs. Mehlin if she had permission of her husband to take the automobile, did you? A. No, sir.

Q. And why didn't you?

A. I—I don't think the question occurred to me.

Q. In other words, isn't it true, Mr. Dennis, that you just assumed that the wife had permission to use the automobile and give anyone else permission to do it? A. Yes, sir.

Q. You knew that Wilbur Mehlin was the named insured, did you not, on the policy?

A. That is right.

Q. And you knew that Mr. Claggett resided in California, did you not?

A. Temporarily, you mean? Yes.

Q. Did Mr. Claggett ever at any time to your knowledge reside any place else other than California? A. Yes, sir.

Q. Where did he come from?

A. Well, his parents lived in Mora, Minnesota,

(Testimony of John Dennis.)

while he was living at this address in Richmond. At that time I think it was on a temporary basis, too.

Q. I see. Did you ask Mr. Claggett whether he was acquainted with Mr. Mehlin?

A. I knew after I had talked to him that he didn't know. Whether [95] he volunteered the information or elicited on a direct question or not, I don't remember.

Q. I see. So, Mr. Dennis, you knew after you interviewed Mr. Claggett that he didn't even know Mr. Mehlin. That is your testimony, is it not, sir?

A. That is right.

Q. And even though you knew that Mr. Claggett didn't even know Mr. Mehlin you still assumed that this case was covered, didn't you?

A. Well, I don't assume those things to begin with. I mean, I don't have to make an assumption. My position is going out, the contact with Claggett was not to cover whether he knew Mr. Mehlin or whether he had Mr. Mehlin's permission to use the car, and on the face of it there wasn't anything to arouse suspicion that he didn't, so I concerned myself that particular day only with finding out how the accident happened. Does that explain why I didn't ask?

Q. Well, Mr. Dennis, as a claim adjustor it is your duty to determine facts from which either you or your superior can determine whether or not the policy covers the driver of an automobile, is that not true?

A. That is true.

(Testimony of John Dennis.)

Q. And you found out in your investigation immediately after this accident that Mr. Claggett didn't even know Mr. Mehlin, didn't you? [96]

A. That is true.

Q. And you knew Mr. Claggett was residing in California and Mr. Mehlin was residing in Lincoln, Nebraska; you found out that, didn't you?

A. That is true.

Q. And you still didn't even question whether or not the policy covered Mr. Claggett, did you?

A. Well, I knew that it would have been physically impossible for Mr. Claggett to have had Mr. Mehlin's permission and Mr. Mehlin was in Nebraska and Mr. Claggett in California, so obviously he couldn't have asked Mr. Mehlin for his permission and I just didn't ask the question.

Q. I see. So you just didn't raise any question of coverage even though you knew he couldn't have had permission?

A. Not at that time.

Q. At any time did you?

A. Well, we never had another opportunity to talk to Mr. Claggett, as I recall.

Q. Well, whether you had an opportunity to talk to him or not, did you ever?

A. No, none.

Q. Raise the question of coverage even though you knew from the—immediately after the accident occurred, that Mr. Claggett didn't even know Mr. Mehlin and couldn't have gotten his permission?

A. Did I raise any question?

(Testimony of John Dennis.)

Q. Yes.

A. You mean raise the question of coverage in a conversation with Mr. Claggett?

Q. At any time?

A. In the office.

Q. With your superior, outside of the office, inside the office, or any time?

A. No, sir, I don't think the question was ever raised until much later in July, 1948.

Q. Until Mr. Bledsoe raised it in July of 1948?

A. That's right.

Q. Now, when Mr. Claggett was served with this summons and complaint for something in the neighborhood of \$100,000, did he talk to you?

A. I don't believe so, but I don't remember.

Q. Did you receive a summons and complaint, yourself?

A. It was handled by me and I don't remember whether Claggett brought it to me or whether it was mailed to me or how I did get it, and I'm not sure I talked to Claggett at that time or not, but I don't believe so.

Q. You did talk to Claggett when you took his statement?

A. Yes.

Q. At that time did you tell him if he received a summons and complaint to immediately get in touch with you? [98]

A. I would be only guessing, I am not certain, almost certainly I did. If there was a proof of loss in the office you would tell them if they are served to present the summons and complaint.

(Testimony of John Dennis.)

Q. You also tell them not to talk to anyone else except you about the case, do you not?

Mr. Heafey: That is objected to as immaterial.

Mr. Boyd: I think it is very material as to the instructions this witness gave Mr. Claggett as to who covered him under the policy.

The Court: I will allow it on that ground.

Mr. Heafey: You say did you always or did——

The Witness: I told him that.

Q. (By Mr. Boyd): Well——

A. I don't always do it and I don't remember whether I did then or not.

Q. You generally tell them that, don't you?

A. No, I don't know whether I generally do or not. Sometimes you do if you have reason to believe that a man might make damaging admissions which were not true. In any event, in this case I don't believe I did.

Q. You don't recall, but you don't think you told Mr. Claggett not to talk to any attorney representing the plaintiff or anything of that kind?

A. I doubt it, because Mr. Claggett was represented by counsel [99] at the time and if I told him something like that he might have misinterpreted. He either had been charged with a criminal violation or was about to be, and retained counsel there in Richmond and I left the matter up to him what to do.

Q. On the criminal proceedings file, Mr. Dennis?

A. Yes.

(Testimony of John Dennis.)

Q. That was because of the accident itself, was it? A. Yes, it must have been.

Q. Now, did you at any time after you received a summons and complaint have any correspondence with Mr. Claggett?

A. Correspondence in writing?

Q. Correspondence or conversation.

A. I don't think so. I saw him again, of course, at the time this thing was tried between the time I first talked to him during the week or two weeks immediately following the accident, I probably talked to Claggett more than once. In fact, I did talk to him more than once, but from a period of about two weeks after the accident until the time of trial I don't think, because to the best of my recollection Mr. Claggett went back to Minnesota.

Q. At any time, Mr. Dennis, after the accident occurred, did you ever tell Mr. Claggett that you had arranged for the State Farm attorneys to defend Mr. Claggett? A. No, sir.

Q. At no time. Did you ever notify him, or did your company, [100] to your knowledge, that the amount of the suit was in excess of the policy limit that the State Farm Mutual carried on that automobile?

A. As I recall, Mr. Claggett was personally served and had seen the complaint, so I wouldn't have told him that. I am trying to recall whether I did. If he brought the complaint in and I had a chance to talk, I wouldn't have told him that because he was able to read and he would have the

(Testimony of John Dennis.)

complaint in his possession, but it is possible that if he brought the complaint in my office personally to give it to me I might have looked at it and seen that the amount was in excess of the limit and advised him that it was the fact that he didn't get an excess letter would seem to indicate that he did, but I don't remember.

Q. I see. A. I really don't know.

Q. In other words, it is your practice, Mr. Dennis, to either advise the assured or the driver personally that the amount of the suit is in excess of your policy limit and that they are entitled to get their own attorneys at their own expense if they so desire, or write them an excess letter, is that true, to the same effect?

A. Well, I believe that is, but it is something I don't do and couldn't answer because it would be one of the managerial officers who would write the excess letters, I don't write them. As soon as the claim is brought to suit, well, the excess [101] letters are written by the superintendent. He is responsible for advising either the assured or persons claiming protection under the policy that the amounts demanded are in excess of the policy limits.

Q. Is it the practice of the company from your experience to write excess letters to the insured or those claiming under the policy that the amount of damages alleged in the complaint exceed the policy limit?

A. I believe that it is automatic to do that where

(Testimony of John Dennis.)

a named assured, or member of his family is a defendant or has been served. I don't know whether they do it in the case of a person claiming protection who are not named in the policy; I don't know.

Mr. Boyd: That is all, Mr. Dennis.

Redirect Examination

By Mr. Heafey:

Q. Did Mrs. Mehlin ever at any time tell you while talking to her in the early part of November 1947, in the early part of November 1947, that she and her husband had separated and that she had taken the car out of the state of Nebraska without his consent? A. No, sir.

Mr. Boyd: That is objected to on the grounds it is self-serving, leading and suggestive.

The Court: I will allow the answer. Anything further?

Mr. Heafey: That is all. [102]

The Court: We will take a short recess now. During the recess bear in mind the admonition I have heretofore given you.

(Brief recess.)

Mr. Boyd: Your Honor please, I understand Mr. Hunt has asked to leave. I have two or three questions I would like to ask him at this time.

WILLIAM R. HUNT

resumed the stand, previously sworn.

Further Cross-Examination

By Mr. Boyd:

Q. Mr. Hunt, who is the chairman of your claims committee that you referred to, Mr. Carroll Brockhorst?

A. Not always.

Q. He was on January 22, 1948, when this case went to the claims committee.

A. He could have been, I don't know for sure.

Mr. Heafey: May I see that, counsel? I would like to have the court examine this first, your Honor. This, in my opinion, is absolutely immaterial to any of the issues in this case.

The Court: What is the purpose of that?

Mr. Boyd: To corroborate Mr. Castro's testimony, if your Honor please, that they offered \$7500 and indicate might go to \$8500. Is that stipulated?

Mr. Heafey: No question about that. That is stipulated. [103]

The Witness: I admitted that in my testimony.

Mr. Heafey: In the early part of 1947.

The Court: I think that only deals, the letter only deals with the question whether or not they had contributory negligence.

Mr. Boyd: That is correct.

Mr. Heafey: I have no objection to that.

Mr. Boyd: May we read it into evidence, Your Honor?

(Testimony of William R. Hunt)

Ladies and gentlemen, this is a letter dated February 1, 1948, Lincoln, Nebraska, Claim Department, to Mr. W. R. Hunt, Assistant Claims Manager.

“We note the copy of your letter of February 6 to attorneys Dana, Bledsoe & Smith.

“In the report of investigation under paragraph 4, Insured Driver—permission—Agency it is stated Duane Richard Claggett borrowed the car from Mrs. Mehlin the wife of the named insured and he was driving the car with her permission and consent. We did not discover in the file particularly whether Claggett was an agent of our insured or whether he was driving the car for the benefit of our insured or spouse. We do not know of the intricacies of the law of California and therefore do not know whether we want to send the regular excess suit notice letter to our assured, and for that reason believe if the suit letter is to be [104] sent, it should come from you boys who know the law of land in which this accident occurred.

“If you agree with me and do send the suit letter, please forward us a copy.”

Counsel, I would like also to read the excess letter that went out in April. It has been referred to by the witness.

Mr. Heafey: Yes, we have no objection to that.

Mr. Boyd: On April 15, 1948, a letter written by Mr. G. E. Meyers, Claim Superintendent of the State Farm Mutual Auto Insurance Company to

(Testimony of William R. Hunt)

Marvin Mehlin, 210 North 29th Street,, Lincoln, Nebraska.

“We have forwarded the file in connection with the above claim to Dana, Bledsoe & Smith, attorneys, 440 Montgomery Street, San Francisco, California, and have asked that they look after the defense on the lawsuit brought against you by Bertha Lee Porter, Charles Earl Porter and John Richard Porter.

“These attorneys will give the matter all the necessary attention and when they wish you to call at their office with reference to the case, they will notify you. When you hear from them, please comply with all requests they may make.

“As the duly authorized representatives of your insurance carrier, these lawyers are, under the terms of your policy, entitled to your complete cooperation throughout the handling of this litigation, and we would [105] appreciate his having the benefit thereof.

“We note that the amount claimed against you in this suit is in excess of the protection afforded by your policy, and should a judgment in this case exceed the limits of your policy, you would be personally liable for the balance over and above that amount. In view of the possible personal liability, it will be agreeable with this company and its representatives, for you, if you so elect, to procure attorneys of your own choosing at your own expense to represent you personally and appear in this mat-

(Testimony of William R. Hunt)

ter in addition to those we have selected and will recompense.

Yours very truly,"

I have no further questions.

Mr. Heafey: Where is that original letter that you referred to?

Mr. Boyd: February 11, I think. Read that one, too. Stipulate.

Mr. Heafey: There was an answer, your Honor, to that letter of inquiry concerning whether or not Mr. Claggett was acting as an agent of Mrs. Mehlin at the time of the accident and counsel has stipulated that answer may be read in evidence.

This is dated February 24, 1948, and it is from John B. Dennis to W. R. Hunt. Reads as follows:

"Original letters from Paul Dana and W. W. Gibson, and a copy of the Answer are attached. These original papers were inadvertently attached to the duplicate file. Your attention is called to Mr. Gibson's request in his letter of February 11, 1948, to which no reply has been made apparently. At least, no copy is in the duplicate file. I miss the significance of Mr. Gibson's letter but to clarify the status of the driver of the car, Duane Claggett, he was operating the car with Mrs. Mehlin's knowledge and consent. He had borrowed the car to attend a dance in Oakland, strictly a social function and strictly for his own benefit. He was not acting as an agent of the insured nor was he driving the car for Mr. Mehlin's benefit.

(Testimony of William R. Hunt)

“With reference to Mr. Dana’s letter of February 17, 1948, the only copy of the transcript of the Coroner’s Inquest would be in the original file. We have no photographs so far as I know. The only photographs, to which I made reference in my marginal report, were those in the Richmond Police Department file which are not available for our inspection or use.

“We will undertake the additional investigation pertaining to the criminal charges. That is to say, I will telephone Mr. Sugarman and ask him what happened.

“Very truly yours,

“/s/ JOHN B. DENNIS.”

Mr. Heafey: That is all, your Honor.

(Witness excused.)

Mr. Boyd: May we have them until we complete Mr. Gripenstraw, please?

Mr. Heafey: You better wait, he is in San Francisco and these two gentlemen are from Berkeley.

Mr. Gripenstraw, will you take the stand?

LOUIS GRIPENSTRAW

called as a witness on behalf of the defendants, sworn.

The Clerk: Will you state your name to the Court and jury, please?

A. Louie Gripenstraw.

(Testimony of Louis Gripenstraw.)

Direct Examination

By Mr. Heafey:

Q. Where do you reside, Mr. Gripenstraw?

A. San Francisco.

Q. What is your business or occupation?

A. Claim adjustor.

Q. For what company?

A. State Farm Mutual.

Q. And for how long have you been employed by that company? A. Since April 1, 1946.

Q. And I will ask you whether or not in the latter part of December of 1947, you had a conversation with Mr. Castro concerning the case of Porter vs. Mehlin? [108] A. Yes, I did.

Q. And had that file been assigned to you for investigation? A. No, it had not.

Q. Did you talk to Mr. Castro in his office?

A. Yes, the offices of Cooley, Crowley & Gaither.

Q. The offices of Cooley, Crowley & Gaither?

A. Yes, sir.

Q. What was your object in going there?

A. My employer, Mr. G. E. Meyers, asked me to contact these attorneys. We had just, apparently a day or two preceding—this summons and complaint had been served, he asked me to contact the firm and protect our time as to filing an answer.

Q. In that connection did you go to their office?

A. Yes, I did.

Q. Did you have a conversation with Mr. Castro concerning that? A. Yes, I did.

(Testimony of Louis Gripenstraw.)

Q. Will you tell me the substance and effect of that conversation, please?

A. I found at this office of Cooley, Crowley & Gaither, Mr. Castro was the attorney which was actually handling this particular file. I had a conversation with Mr. Castro in his office, asked him first if he wanted us to prepare an answer at that time or hold it temporarily on an oral stipulation. He granted us time. He granted us time, I think indefinite. He told us we could make an oral stipulation to have a little [109] time to investigate. I also asked him if he had a demand to make at that time toward a compromise settlement. I believe Mr. Castro replied that he wanted to talk further with his clients, before they made any demand.

Q. And I will ask you if, on that occasion, you stated to Mr. Castro that there was no question of permissive use as far as Mrs. Mehlin was concerned and that she had the permission of the named insured to bring the car here from Nebraska?

A. I don't believe that there was any discussion at all, at least in my presence, in regard to permissive use.

Q. Did you make that statement to him at that time? A. No, I did not.

Q. Was there any discussion at all regarding permissive use? A. Not to my recollection.

Q. Or policy violation? A. No, sir.

Q. Or policy coverage? A. No, sir.

Q. Did he at that time give you a figure to transmit?

(Testimony of Louis Gripenstraw.)

A. Not on the first occasion I talked to Mr. Castro. He told me, as I said, that he wanted first to talk to his clients to determine what they had in mind.

Q. And did you subsequently again see Mr. Castro? A. Yes, I did.

Q. Did you talk to him on the phone or see him in the office? [110]

A. I don't recall which it was the second time. I think it was in his office, but it may have been by telephone.

Q. On that occasion did you have a conversation with him? A. Yes, I did.

Q. And what was that conversation?

A. Apparently Mr. Castro had been discussing the possibility of settlement with our Mr. Hunt. Mr. Castro advised me that they would have to ask our full policy limits as a basis of any settlement. I asked him for an additional stipulation of two weeks, which he granted me, and took that statement as to the full policy limits back to our Mr. Meyers.

Q. Did Mr. Castro at that time mention a figure that had been given to him by anyone, the settlement figure?

A. I believe he mentioned the figure of \$7500. Whether or not that was an offer made to him or a figure that had arisen in another discussion, I don't know.

Q. Did you offer him that amount?

(Testimony of Louis Gripenstraw.)

A. I made no offer.

Q. Did you have any authority on that occasion to make any offer. A. No, sir.

Q. Or on the preceding occasion?

A. No, sir, I had no authority.

Q. And did you, on that occasion or at any time, ever tell Mr. Castro that there was no question concerning permissive use and [111] that Mrs. Mehlin had the permission of the named insured to bring the car here from Nebraska? A. No, sir.

Mr. Heafey: You may cross-examine.

Cross-Examination

By Mr. Boyd:

Q. Mr. Gripenstraw, did you receive a letter with the file or did you work out of the Berkeley office at that time?

A. I cover San Francisco for the company and I always have. We have no claims office here. I go to Berkeley approximately twice each week.

Q. Where did you obtain this file before you talked to Mr. Castro?

A. I didn't obtain the file. Mr. Meyers called me into this office, showed me the summons and complaint. I believe I made penciled notations showing the attorneys' names, plaintiff, the defendant, the defendant had been served papers. I don't recall anything further.

Q. And you knew then at that time that you

(Testimony of Louis Gripenstraw.)

talked to Mr. Castro that Duane Claggett had been served with summons and complaint?

A. I knew that, yes.

Q. You appeared at Mr. Castro's office and asked for a stipulation of time in which to plead on behalf of Duane Claggett, did you not?

A. Not exactly in that way; no, sir. I asked whether or not [112] the plaintiff attorneys wanted us to file an answer immediately or whether he thought it might be something that could be settled and would agree to an extension of time.

Q. And did you obtain an extension of time in behalf of Duane R. Claggett when you talked to Mr. Castro?

A. I obtained a stipulation to extend the time in behalf of the defendant.

Q. Was the defendant that was served at that time Duane R. Claggett, the driver of the automobile?

A. I couldn't say, I don't remember.

Mr. Heafey: We will stipulate it was, counsel.

Mr. Boyd: I want to test this witness' recollection.

Q. Is it your testimony, sir, that you walked into Mr. Castro's office and to ask time for all the defendants that were named in this action?

A. There were several defendants. I asked whether or not he wanted us—he knew that we were the carrier, wanted us to refer this matter immediately to our counsel for an answer, or did he wish to discuss it further.

(Testimony of Louis Gripenstraw.)

Q. Wasn't it the purpose of your trip to San Francisco to obtain time for the defendants?

A. Either obtain time or obtain their attitude that they wanted us to file an answer immediately, in which case we would.

Q. Who did you obtain time for, sir?

A. On behalf of our policy holder. [113]

Q. Who was your policy holder?

A. The named—on our file it is Mehlin.

Q. So it is your testimony you came to Mr. Castro's office and asked for time on behalf of Mr. Mehlin?

A. It would have been, yes.

Q. Even though Mr. Mehlin hadn't been served with summons and complaint?

A. He is mentioned. I wished to protect our policy.

Q. Mr. Meyers didn't tell you who had been served with summons and complaint?

A. That is correct, I had the names.

Q. You had the names? A. Yes, sir.

Q. You knew then Mr. Claggett had been served, didn't you?

A. It wasn't brought up, it was whether he wanted an answer immediately or not.

Q. My question, sir, is: At the time you went to Mr. Castro's office, didn't you know that Mr. Claggett had been served with summons and complaint?

A. As a point of fact I don't know who had been served. My familiarity with the case was very, very slight.

(Testimony of Louis Gripenstraw.)

Q. You didn't know whether anyone had been served?

A. It must have been served or wouldn't have it in our office. Mr. Meyers had told me it was served within the preceding two or three days, I think. [114]

Q. But you did not know who had been served?

A. No, sir.

Q. Is it your custom to go out to plaintiff's attorneys and ask for extensions of time without knowing who or which individual defendant has been served?

A. That would be only a rare occasion, usually only one defendant.

Q. When there are more than one defendant, don't you determine who has been served before you contact an attorney and ask for time in which to plead?

Mr. Heafey: We object to this on the ground it is immaterial.

The Court: I will allow it; it is cross-examination.

A. I can't answer that either yes or no. Normally I would have a great deal more familiarity with the files than in this particular case. This wasn't my file, merely sent across the bay by Mr. Meyers to see whether or not they wished the answer filed or make an extension of time.

Q. Mr. Gripenstraw, you have frequently handled lawsuits in which there are two automobiles

(Testimony of Louis Gripenstraw.)

involved and both drivers have been served, have you not, sir? A. That is correct.

Q. And before you take time in which to plead, don't you determine which policy, which automobile his policy covers? A. Yes, I do. [115]

Q. And you wouldn't certainly have gone into Mr. Castro's office and asked for time in which to plead without knowing who had been served, would you?

A. Apparently did at this time, yes.

Q. In other words, aren't you testifying that you don't recall as to who had been served at the time? A. That is correct.

Q. But whoever had been served, you went over to Mr. Castro and asked him for time in which to plead? A. Yes.

Q. You mean to say, is it your testimony that Mr. Castro didn't ask you what your policy limits were? A. He did ask me that.

Q. He did ask you that, and what did you tell him? A. I told Mr. Castro I did not know.

Q. Didn't you tell him you weren't at liberty to disclose that information?

A. I did not know it, that was my answer.

Q. You didn't know it?

A. That is correct.

Q. Did you ever disclose your policy limit to an attorney representing the plaintiff?

Mr. Heafey: That is objected to as incompetent, irrelevant and immaterial.

(Testimony of Louis Gripenstraw.)

The Court: Yes, I think so. [116]

Mr. Boyd: Let me ask, if your Honor please—I will reframe the question.

Q. Don't you have instructions from your company not to disclose the policy limits of your insurance to any plaintiff or plaintiff's representative?

Mr. Heafey: Objected to on the ground it is immaterial, not proper cross-examination.

Mr. Boyd: Having a connection with Mr. Castro's testimony, your Honor please.

The Court: I have allowed the question.

(Question read by the reporter.)

A. I have no instructions to that effect.

Q. (By Mr. Boyd): Didn't you tell Mr. Castro that you were not at liberty to disclose the policy limit?

A. I don't recall making that statement.

Q. Didn't you tell Mr. Castro that you could say that it was more than \$5000?

A. I don't recall making that. I might explain by way of explanation, I believe I told Mr. Castro that the great bulk of our policies on automobiles are the ten and twenty thousand dollar policies. Mr. Castro said, "I don't believe you write a five and ten thousand policy, to my knowledge." The State Farm does not. Mr. Castro told me at that time that before he could give us any demand he would have to have a certified copy of our policy.

(Testimony of Louis Gripenstraw.)

Q. Didn't you tell Mr. Castro that you could tell him that the policy wasn't more than \$10,000?

A. I did not; I didn't, no.

Q. Do you write policies for more than \$10,000?

A. Yes, the State Farm does.

Q. They do?

A. Yes, sir.

Q. But you didn't say anything to Mr. Castro about the policy not being more than \$10,000?

A. I didn't, no; no, sir.

Q. You may have said something that it was more than \$5000?

A. Yes, sir.

Q. Didn't you also tell him, Mr. Castro, that anything over \$7500 would have to be approved by your Bloomington, Illinois, office?

A. No, sir.

Q. Isn't it a fact that anything over \$7500 has to be approved by that office?

A. Not to my knowledge.

Q. You have the authority to pay the policy?

A. I had the authority to pay \$3000.

Q. \$3000.

A. The claims committee has the authority to pay the full limit.

Q. But at the time you talked to Mr. Castro, the sum of \$7500 was mentioned in some way, was it? [118]

A. Yes, it was, to my remembrance.

Q. You are certain that wasn't Mr. Castro's demand in settlement?

A. No, sir, he wanted the full limit.

(Testimony of Louis Gripenstraw.)

Q. He wanted the full limit of the policy?

A. That is correct.

Q. But he didn't make any figure, name the sum of \$10,000?

A. I don't recall the figure \$10,000 being mentioned.

Q. Did you also say to Mr. Castro on some cases with a \$10,000 policy you paid as much as \$8500 or \$9000 in exceptional cases?

A. I don't recall making any statement to that effect.

Mr. Boyd: That is all.

Mr. Heafey: That is all.

Mr. Bledsoe, will you take the stand?

LEIGHTON M. BLEDSOE

called as a witness on behalf of the defendants, sworn.

The Clerk: Will you state your name to the court and jury, please?

A. Leighton M. Bledsoe.

Direct Examination

By Mr. Heafey:

Q. Mr. Bledsoe, you are an attorney-at-law, are you not? A. Yes.

Q. Licensed to practice in the courts of the state of California? [119] A. Yes.

Q. And in the Federal Court? And you are a member of what firm?

(Testimony of Leighton M. Bledsoe.)

A. Dana, Bledsoe & Smith.

Q. And during the year 1948 were you a member of that firm? A. I was.

Q. And where were your offices?

A. 440 Montgomery Street.

Q. Now, during the year 1948 had a file been referred to your office by the State Farm Mutual for defense, a file that was entitled Porter vs. Claggett and Mehlin? A. Yes.

Q. Did that file come to your attention?

A. It did ultimately, yes.

Q. And when did that file first come to your attention? A. July 2, 1948.

Q. And at that time had the case been set for trial? A. It had.

Q. Who had been handling the file in your offices prior to that time?

A. The case was assigned to Mr. Dana.

Q. Does your file indicate when that case was referred to your office by the State Farm Mutual Insurance Company?

A. Well, it came under a letter of transmittal and we have a stamp on that letter dated February 7, 1948.

Q. Now, did you review the file when it was first handed to you? [120]

A. Yes, I took it home on the night of July 2 to review.

Q. At that time had the case been set for trial?

A. Yes.

(Testimony of Leighton M. Bledsoe.)

Q. What was the date for the trial?

A. July 6 or 7, I believe.

Q. And that case was pending in what county?

A. Contra Costa.

Q. Now, what if anything did you do with reference to that file after you had reviewed it?

A. Well, in reviewing it, I noticed a letter had been received from attorneys in Nebraska.

Q. What firm of attorneys was that?

A. Ginsburg and somebody else.

Q. You have that letter there or is it in here?

A. Here it is. Ginsburg & Ginsburg, Lincoln, Nebraska, a letter dated April 19, 1948.

Q. What was the date of that letter?

A. April 19, 1948.

Q. And what information did you receive concerning this matter from that letter?

Mr. Boyd: If your Honor please, I am going to object to the contents of that letter as calling for hearsay. It is something that has been told to an attorney in Lincoln, Nebraska, and in turn communicated by the attorney at Lincoln to this witness. I think it is hearsay; object to it on that ground. [121]

Mr. Heafey: Goes to the proposition of notice to the company, notice to the attorneys for the company, and what action was taken thereafter on the proposition of estoppel.

The Court: We have already had that letter, it was mentioned before, already stipulated there was a letter to the effect—Grinsburg & Ginsburg, was it?

(Testimony of Leighton M. Bledsoe.)

Mr. Heafey: Yes.

The Court: To the effect that this car was taken out of the state without the permission of the assured.

Mr. Heafey: That is the substance and the effect of it.

The Court: All right.

Mr. Heafey: That was stipulated, as to the effect of the letter.

Mr. Boyd: And stipulated in evidence. Your Honor has ruled the letter should not be read into evidence, the contents.

The Court: I don't think so, I will allow that part of it——

Q. (By Mr. Heafey): Mr. Bledsoe, in substance and effect was that what the letter stated?

A. That is correct, yes.

Q. And——

A. There were some other things stated in it. It indicated how the attorneys happened, how Mr. Mehlin happened to have gone to see the attorneys and indicated that he had received that excess letter from the company.

Q. Mr. Mehlin had? [122] A. Yes.

Q. And this was in answer to that telling how the car had been taken from the state of Nebraska, is that correct? A. Yes.

Q. What action, if any, did you take with reference to that file after reading that letter?

A. Well, the next morning was Saturday, July

(Testimony of Leighton M. Bledsoe.)

3, and the insurance company office was closed, and my first knowledge that the case had to go to trial was given to me on the 2nd. I think Mr. Dana up to that time had been trying to get it continued, and either he was going to be away or engaged in a trial and couldn't handle the case, so I was advised on the 2nd of July that we were going to have to go to trial on the 6th or 7th of July and that it was up to me to get it ready for trial, so my first concern was to find out where the driver Claggett was and try to contact him, and so I called the office of the State Farm and found some man there and told him that I wanted to locate Claggett and he was an adjuster over there that didn't know anything about the file, and the man, Mr. Dennis, who was handling it, wasn't there that day, on that particular Saturday, so he simply told me he would leave a message for the adjuster and they would make some effort to locate Claggett.

At the same time, on Saturday morning, I sent a telegram to Claggett at the Richmond address and requested that he call [123] my office, requested that he come into the office on Tuesday, July 6.

Q. What address did you send that telegram to?

A. 1106 Main Avenue, Richmond, California.

Q. Is that the only address you had in the file of Mr. Claggett's?

A. Yes, that is the only idea as to his possible whereabouts. There were some letters that had been addressed to him at that same address back on

(Testimony of Leighton M. Bledsoe.)

March 13, 1948. Mr. Dana had written a letter to him at that address, advising him of the trial date. There was no response to that letter. So, after sending that telegram, I likewise called attorney Crowley at Cooley, Crowley & Gaither's office. I asked for Mr. Castro and was advised he was away for the 4th of July weekend, and Mr. Crowley told me that Mr. Castro was handling it. I told Mr. Crowley that we were trying to get a continuance of the trial because it was Mr. Dana's case. I also told Mr. Crowley that I had learned from looking at the file that there was a possible policy defense involved and that I had been unable to get in contact with Claggett, the driver of the car, to get any additional information from him; that I had reviewed the answer that Mr. Dana had filed and noticed in the answer an admission with reference to permissive use. I told him that we were going to ask to amend that, because from my review of the file and from this letter that had been received from Nebraska I felt that we should make that amendment. [124]

And I told him what the information was that I had received by this letter from Nebraska. Mr. Crowley said that the matter wasn't in his hands for decision, that Mr. Castro would be back on the 6th. I think the trial was at that time set for the 7th of July, the 6th being a Tuesday—Monday was a holiday.

So I prepared papers for a request to amend

(Testimony of Leighton M. Bledsoe.)

the answer and change the pleading in the respects which have been indicated, and I also prepared a reservation of rights agreement which I was going to ask Claggett to sign when he came in on Tuesday, the 6th. And I prepared a motion for a continuance and had an affidavit signed by Mr. Dana and myself with reference to the request for the amendment and the continuance.

Q. That affidavit that was prepared at that time, was that an affidavit to substantiate or support the motion to amend your answer?

A. I believe it was, yes.

Q. And was that affidavit signed by Mr. Dana?

A. Yes.

Mr. Heafey: That affidavit for our motion was read in evidence, your Honor.

The Court: That is right.

Q. (By Mr. Heafey): What transpired after that time?

A. Then on Tuesday—it was the first time that there was anyone at the State Farm that was familiar with the file and had [125] any knowledge of it. I called the office of the State Farm and I think I spoke to Mr. Hunt and told him of this question of policy coverage and advised him that we had been endeavoring to locate Claggett and hadn't heard from Claggett, that we had this, received this letter from Nebraska about a possible bringing of the car out here without permission and I thought that we should take a reservation of rights agree-

(Testimony of Leighton M. Bledsoe.)

ment from Claggett, that we should also interview the named insured and his wife and get statements from them about the circumstances involved, that we had not had time to brief the law of Nebraska with reference to the situation, and that we would undoubtedly have to get some lawyers in Nebraska to advise us about the legal aspects with reference to the policy coverage question and the law of Nebraska with reference to permissive use.

So he advised me he would—I believe he said he would telephone their Nebraska office and have them get Claggett in and try to get Claggett to get out here for trial. I told him the case was scheduled to go the next day and I didn't know whether I was going to be successful in getting a continuance or not, but do the best they could. In the meantime we were sending Mr. Dennis out to see if Claggett was at Richmond, and the following day I went to Martinez to make my motions.

Q. And was your motion to amend the answer granted? A. Yes, it was.

Q. And the amendment to the answer was then filed? [126] A. That is correct.

Q. And did you make a motion for the continuance of the case? A. I did.

Q. Was that motion granted?

A. It was.

Q. On what condition?

A. It was granted on condition that we pay the jury fees. I think the jury had been called

(Testimony of Leighton M. Bledsoe.)

and was there in the court room the day of the trial. And we were required to pay the jury and the expenses of the plaintiff, Mrs. Porter, in coming to the trial from southern California.

Q. Were those items paid for? A. Yes.

Q. And the case was continued to what date?

A. It was continued a week, I believe, to the following week, the 13th of July, 14th—I guess it was the 13th, because Monday is law and motion day in Martinez. It was the day following that, I think that was the 14th.

The Court: Talking about continuance, I advised you gentlemen I was going to leave at 3:30. I think we will have a continuance, but it won't be for a week. It will be until tomorrow morning at 10 o'clock.

During the adjournment bear in mind the admonition the Court has heretofore given you.

(Whereupon an adjournment as taken until Friday, January 6, 1950, at 10:00 o'clock.)

Morning Session, Friday, January 6, 1950,
at 10:00 o'Clock

The Clerk: Porter vs. State Farm Automobile Insurance Company, on trial.

The Court: Stipulated the jury is all present?

Mr. Heafey: Yes, your Honor.

Mr. Boyd: So stipulated, your Honor.

LEIGHTON M. BLEDSOE

resumed the stand, previously sworn.

Direct Examination

(Continued)

By Mr. Heafey:

Q. Mr. Bledsoe, at the recess last night I believe we were in Martinez. You were making a motion for a continuance of the trial date, of the case of Porter vs. Claggett. Now, at the time and while you were in court, was anything said about the coverage, or the possibility of lack of coverage?

A. Yes, there was. We made the motion in chambers of Judge Patterson's court and at that time Mr. Castro was present and I told the court that I had just picked up the file on July 2 and had been unable to make a contact with Claggett, that I had sent a man to try to locate Claggett and had been advised that he had gone back to his home in Minnesota, and I told the court at that time that a serious question of policy coverage had come up, that I felt that I should talk to Claggett and get something, [128] some more facts and that was one of the reasons why I wanted the continuance.

Q. And did you thereafter, and while you were in Martinez, have a conversation with Mr. Castro concerning that subject matter?

A. Yes, I believe that the question of coverage discussion came up with him the second time, the following week, when we went up there. I don't believe we discussed it very much on the first occa-

(Testimony of Leighton M. Bledsoe.)

sion, except in chambers of Judge Patterson's court.

Q. What conversation did you have with Mr. Castro at the time the continuance was requested?

A. Well, at that time I simply restated what I had told Mr. Crowley on Saturday the 2nd, we had received this letter from Nebraska, the Ginsburg firm, and advised him of the contents of the letter and told him that we had a serious question of coverage, that I was desirous of trying to locate Claggett and the Mehlin's, and that I was still, wanted full information of all the facts and wanted confirmation of the facts.

Q. Now, in the case pending at Martinez, of Porter vs. Claggett, at the time that case was set for trial had a jury been demanded?

A. Yes, it had.

Q. And by whom had a jury been demanded?

A. By Mr. Castro's office.

Q. Was that jury, trial by jury subsequently waived? A. Yes, it was.

Q. After the continuance was granted? [129]

A. I discussed the matter with Mr. Castro, according to my time sheets here, on the 10th of July, at which time he advised that he was going to waive the jury and wanted to know if I would also waive it. I told him at that time that I probably would waive it, but that it would depend on Claggett and have to get his consent to it and I wouldn't be able to say whether I could or not until he arrived and could confirm it with Mr. Claggett.

(Testimony of Leighton M. Bledsoe.)

Q. Did you subsequently talk to Mr. Claggett about it?

A. Yes, I did. I saw him on the 13th of July. He came out here by airplane and I saw him in my office on the 13th of July.

Q. Was that the first time you had talked to Mr. Claggett? A. Yes.

Q. And at that time did he sign a written agreement to the effect that he was willing to waive a jury?

A. Yes, I requested he do that. I discussed with him and asked him if he was willing to do it and he said he was.

Q. At that time did you have him sign anything additional?

A. Yes, I had him sign a non-waiver agreement.

Q. I will show you what purports to be a non-waiver agreement.

Have you seen this, counsel?

Mr. Boyd: No objection, counsel.

Mr. Heafey: All right.

Q. Dated—is that July 6 or July 13?

A. Well, I will have to explain this. This was prepared over [130] the weekend of July 3 and 4, at which time I was expecting Mr. Claggett to respond to my telegram and come in the office on July 6. I requested he come in on the 6th, so that was dated originally the 6th, and he didn't come on the 6th, because he wasn't in the state. When he did arrive it was on the 13th, so the date was

(Testimony of Leighton M. Bledsoe.)

written above the 6th to show the 13th is the actual date he signed it.

Q. It was signed on the 13th?

A. Yes, in my presence.

Mr. Heafey: We will offer this in evidence, your Honor, and ask it be marked with the defendant's next number.

Mr. Boyd: No objection.

The Court: Admitted.

The Clerk: Defendant's exhibit A in evidence.

(Whereupon the document referred to was received in evidence and marked defendant's exhibit A.)

Mr. Heafey: Could I read that to the jury now, your Honor?

The Court: Yes.

Mr. Heafey: (Reading):

(Testimony of Leighton M. Bledsoe.)

DEFENDANT'S EXHIBIT A

“San Francisco, California

“July 13, 1948

“Messrs. Dana, Bledsoe & Smith

440 Montgomery Street,

San Francisco, California

“Re: Bertha Lee Porter and Charles Earl Porter and John Richard Porter, minors, by and through Bertha Lee Porter, guardian ad litem, plaintiffs, vs. Duane R. Claggett, [131] Wilbur M. Mehlin, Marvin Mehlin, et al, Defendants.

“Gentlemen:

“This is to advise you that I agree that your firm, as attorneys and representatives of State Farm Mutual Auto Insurance Company, and also that any of your representatives and any representatives of State Farm Mutual Auto Insurance Company, may participate in any investigation, defense and/or adjustment of the case now pending between Bertha Lee Porter and Charles Earl Porter and John Richard Porter, minors, by and through Bertha Lee Porter, their guardian ad litem, plaintiffs, vs. Duane R. Claggett, Wilbur M. Mehlin, Marvin Mehlin, et al, defendants, which said case is now pending in the Superior Court of the State of California, in and for the County of Contra

(Testimony of Leighton M. Bledsoe.)

Costa, numbered therein 41468, and any such action heretofore taken, or to be taken, by you or by any of said representatives, is entirely without prejudice to the rights and defenses of State Farm Mutual Auto Insurance Company under its insurance policy numbered 72-064-ST-27, and any other insurance contract; and it is agreed that any such participation does not and will not constitute an admission of liability on the part of said State Farm Mutual Auto Insurance Company under said and any contract of insurance. [132]

“I likewise hereby waive any right that I have, or may have, to claim that the State Farm Mutual Auto Insurance Company has waived any right to deny liability under said and any contract of insurance.

“At the same time I in no way waive any of my rights against the State Farm Mutual Auto Insurance Company under said or any contract of insurance.

“Very truly yours,

“DUANE R. CLAGGETT.”

And beneath that is the following:

“I agree that a trial by jury may be waived.”

And signed by Duane R. Claggett.

(Testimony of Leighton M. Bledsoe.)

Q. Now, in that connection, Mr. Bledsoe, did you ascertain that the company had previously on the 9th of July, 1948, taken a non-waiver agreement from Mr. Claggett in Minnesota?

A. Well, yes. To lead up to that, I had requested the company to contact him and on contacting him to get a non-waiver agreement, that the local office did not know whether that had been obtained and when Claggett arrived I asked him if they had asked him to sign one. He said they had, but didn't have a copy of it, so I didn't know the contents of it, what its effect was, so I had him sign this other.

Q. I will show you what purports to be a non-waiver agreement signed on the 9th day of July, 1948, and I will ask you if you recognize the signature at the bottom of that agreement as [133] being the signature of Duane R. Claggett?

A. Well, I am not a handwriting expert, but all I can say, it looks like the same signature.

Q. Was the signature he put on the non-waiver agreement that you obtained, was that signed in your presence? A. Yes, it was.

Q. And does the other signature appear to be the same handwriting? A. Yes, it does.

Mr. Heafey: We will offer the other non-waiver agreement in evidence, too, your Honor.

The Court: Admitted.

The Clerk: Defendant's exhibit B in evidence.

(Testimony of Leighton M. Bledsoe.)

(Whereupon the non-waiver agreement referred to was received in evidence and marked defendant's exhibit B.)

Mr. Heafey: This reads as follows:

DEFENDANT'S EXHIBIT B

“Notice and acknowledgment of non-liability.

“It is hereby understood and acknowledged by and between the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, and Duane Claggett that any action taken by the said insurance company in investigation and/or adjusting and/or defending any claim and/or handling any litigation for the said Claggett growing out of an accident involving Duane Claggett which occurred on or about October 31, 1947, at Richmond, California, shall not be construed as a [134] waiver of the right of the said insurance company to deny any and all liability to said Duane Claggett under any policy or policies insurance issued to Wilbur Marvin Mehlin. It is understood and acknowledged by and between the said State Farm Mutual Automobile Insurance Company and the said Duane Claggett that there is no obligation whatsoever on the part of the said insurance company to investigate and/or settle and/or defend any such claims or handle any such litigation for the said Duane Claggett and that the said insurance company has not admitted any liability to the said Duane Clag-

(Testimony of Leighton M. Bledsoe.)

gett in respect thereto. Dated at Mora, Minnesota, this 9th day of July, 1948.

“STATE FARM MUTUAL
AUTOMOBILE INSUR-
ANCE COMPANY,

“By JULIUS E. KUBIN, JR.,

“Acknowledged by Duane R. Claggett.”

Q. Now, Mr. Bledsoe, did you at any time during the course of any of the litigation ever confer with any of the Mehlin's? A. Never, no.

Q. Were the Mehlin's ever served with a copy of the complaint and summons which was to require an appearance by them?

A. No, they were not, at least they didn't tender any to us.

Q. Did you have a conversation with Mr. Castro at the time of trial with reference to policy coverage? [135]

A. Yes, after the trial was over Mr. Castro asked me about the coverage question and whether I thought it was a good point or not, and what our defenses were, and I told him I was not at that time to answer definitely about it, I still had to get the facts collected from the Mehlin's and I frankly told him I didn't know.

Q. Now, did Mr. Claggett appear for the trial?

A. Yes, he was there and testified.

Q. After the trial was over, did you continue to represent Mr. Claggett in a motion for a new trial? A. Yes, I did.

(Testimony of Leighton M. Bledsoe.)

Q. Why was that?

A. The reason was that this question had come up rather on the eve of the trial and we didn't feel that we could desert Claggett in the middle of the trial and leave him without attorneys, or with the need of getting new attorneys in the middle of the case, and I advised him that we were going to file a motion for a new trial and keep the time open in case he wanted to take an appeal and give him time to get other counsel if he so desired and also to give his other counsel time to look at the case and take it over if they wanted to.

Q. Now, did you ever contact the attorney by the name of Ginsburg who had written the letter that was dated in April of 1948, by telephone?

A. Yes, I did. [136]

Q. And when was that?

A. Well, that was after I had gotten the continuance from Judge Patterson against the—we were up there on the 7th of July and I telephoned Mr. Ginsburg in Nebraska during that week. It was before the trial actually came up and for the purpose of learning where the Mehlin's were and to find out if they would confirm the information that Mr. Ginsburg had supplied us in his letter and to ask him more about the facts and circumstances of the bringing of the car here to California.

Q. Did he tell you where the Mehlin's were at that time?

(Testimony of Leighton M. Bledsoe.)

Mr. Boyd: Your Honor, I think this is purely hearsay. We are getting into what Mr. Ginsburg may have told Mr. Bledsoe.

The Court: I think so.

Mr. Boyd: Object to it on that ground.

The Court: Sustain the objection.

Q. (By Mr. Heafey): Now, Mr. Bledsoe, did your file that was referred to you by the State Farm Mutual Auto Insurance Company before the receipt of the letter from Ginsburg in April, 1948, contain any information at all indicating that the automobile that was covered by the policy of insurance had been taken from the state of Nebraska without the permission of the named insured?

A. No, it did not.

Q. That was the first information you had concerning that? A. That letter, yes. [137]

Q. Now, aside from the letter from attorney Ginsburg, did you file, before that you hadn't any information that—well, I think you have substantially answered—your file did not contain any information indicating that the car was taken out of the state without permission? A. No.

Q. Now, did you ever at any time tell Mr. Castro that it was too late to get a reservation of rights from Mr. Claggett?

A. No, I think Mr. Castro is mistaken about that. I told him that we would not be able to contact Mr. Claggett, that we had tried to reach him and had not been able to for the purpose of getting

(Testimony of Leighton M. Bledsoe.)

a reservation of rights agreement and that we would have to wait until he came to the trial in order to get it.

Q. Did you also represent Mr. Claggett on the criminal proceeding?

A. No, he was represented by other counsel.

Q. The first time you saw Mr. Claggett was on the 13th of July, 1948?

A. That is correct, the first time he was ever in the office.

Q. Do you know when it was that he left California after the criminal proceeding?

A. Immediately after the criminal proceedings which were in March, 1948.

Q. Did you at any time ever talk to Mr. Mehlin? A. No. [138]

Q. Or Mrs. Mehlin? A. No.

Q. Or take any statements from them?

A. No. No statements in our file from them, either, until the statement that was taken on August 25, 1948, was taken back there in a question and answer form.

Q. Those are the statements we referred to yesterday?

A. Yes, they were taken after the trial of the case in Martinez.

Q. And some time in August of 1948?

A. August 25.

Q. I see.

Mr. Heafey: You may cross-examine.

(Testimony of Leighton M. Bledsoe.)

Cross-Examination

By Mr. Boyd:

Just a few question, Mr. Bledsoe.

Q. Who paid the traveling expenses and airplane expenses and so forth, for Mr. Claggett in coming from Minnesota to Richmond or to Martinez in testifying in this case?

A. The insurance company.

Q. And who paid for your services in the trial of the case in which you represented Mr. Claggett in Contra Costa County?

A. The insurance company.

Q. Is that likewise true for your services on the motion for the settling of the findings and motion for a new trial?

A. That is correct.

Q. You say that you wouldn't waive a jury until you obtained [139] Mr. Claggett's written consent; was that correct, sir?

A. Yes, that is the way I did it, had to do it, but have to get his consent and confirmation of it.

Q. You did get his written consent before you formally waived the jury? A. Yes.

Q. Did you get his consent before the answer was filed in his behalf by your office?

A. I don't know what you mean by that. Consent to what?

Q. To file the answer and to represent him.

A. Well, I assume that had been obtained by virtue of the fact he must have tendered the sum-

(Testimony of Leighton M. Bledsoe.)

mons and complaint to the insurance company. We were advised that he had been served with it and they sent the very summons and complaint that had been served on him to us, so we never questioned that. He wants some protection and otherwise wouldn't bring in the summons and complaint.

Q. But you obtained the summons and complaint direct from the insurance company, is that correct? A. That is correct.

Q. And when you filed the answer, rather when Mr. Dana's office, firm, filed the answer, admitting that the automobile was being driven by Claggett with the owner's permission, you didn't obtain Mr. Claggett's consent to do that?

A. Not directly, no. All we did was to look through the file [140] and see statements that had been obtained from Claggett in which he said he had Mrs. Mehlin's consent and the formal report which we had in the file that had been signed by Mrs. Mehlin in which she said she gave consent and that she was the wife of the named insured, and on the basis of that we assumed that the consent had been given.

Q. And when you filed the amended answer stating that Mr. Claggett was operating the car with the permission of Mrs. Mehlin, when you filed that answer in behalf of Mr. Claggett, did you have his consent to do that, sir?

A. I believe so, I think that he verified that amendment. I discussed that with him when he came out here.

(Testimony of Leighton M. Bledsoe.)

Q. Do you have a copy of the answer, the amended answer?

A. I have a verification in here, apparently by him, but I don't know whether that it was used or whether I verified it. I am not sure how that was handled. I see that I prepared one with my verification, July 6, 1948, and I prepared one for him to sign and whether I had signed that before he got here or not, I don't know.

Q. The answer, according to the copy of the pleading served on the plaintiff, Mr. Bledsoe, indicates that the verification of the second answer was made by Leighton M. Bledsoe, sworn to on July 6 of 1948 and signed on July 7, 1948.

A. Well, that was only in connection with the motion, wasn't it? Was that the proposed amendment that was being submitted to the [141] court for—along with our notice of motion? I think we may have filed after the leave was granted, may have filed our answer containing the verification of Claggett on it. I am not sure about that.

Q. I hand you the copy of the answer that—

A. Yes. Well, I assume that at the time we filed the motion I am sure that I verified it, because Claggett was not here at that time and we had to submit a proposed amendment to the court as part of our motion for leave to amend and that had to be made on the 7th of July, which was before Claggett got here and I know I discussed the matter with Mr. Claggett when he did arrive, as I had

(Testimony of Leighton M. Bledsoe.)

prepared a verification for him to sign. Now, whether I had him file another verification and another answer, I am not sure about that.

Q. Did you prepare the second answer or did Mr. Dana prepare it? A. I prepared it.

Q. You prepared the second? A. Yes.

Q. Now, at any time from the time that the file was first referred to your office in February of 1948 up until the first part of July, 1948, did you ever tell Mr. Claggett or anyone in your behalf tell Mr. Claggett that the amount of this suit was in excess of the policy limits of the State Farm Mutual Insurance Company and that he could obtain his own [142] attorneys if he so desired?

A. Oh, I don't think so. Usually those questions are decided by the insurance company as to what their policy is about giving notice. I don't see any letters in our office to him to that effect and I think that all we did was to send him a letter in March that the case had been set for trial in July and to make himself available to us.

Q. Do you have that letter available, Mr. Bledsoe, the copy?

A. I think so. Of course, at that time I think Mr. Claggett was being represented by these attorneys in Martinez.

Q. Do you have a previous letter to this one of March 13 relative to the——

A. Yes, here's one, March 4.

Mr. Boyd: At this time, your Honor, I would

(Testimony of Leighton M. Bledsoe.)

like to read these letters, with agreement of counsel, a letter dated March 4 of 1948 from the firm of Dana, Bledsoe & Smith to Mr. Duane Richard Claggett, 1106 Main Avenue, Richmond, California.

“Dear Mr. Claggett:

“Re: Porter vs. Claggett

“This is to inform you that the trial of the above-entitled action is set for Tuesday, July 6, 1948, in the Superior Court of Contra Costa County, at Martinez, California. In the meantime, plaintiff’s attorney and this office are making arrangements for an exchange of depositions and when a definite date and time for same have been [143] arranged we will advise you. We will keep in touch with you, but kindly keep this trial date in mind.”

On March 13, 1948, a letter to Mr. Claggett from Dana, Bledsoe & Smith:

“We previously informed you the trial in the above action would be held on July 6. We are now informed that due to a holiday the court will be unable to hear this case on that date and instead the matter is set for Wednesday, July 7, 1948. We will keep you informed.

“Very truly yours,”

Q. Did you at any time, Mr. Beldsoe, or your office at any time have any additional correspondence of any kind with Mr. Claggett?

A. After that date?

Q. Either before or after, sir.

(Testimony of Leighton M. Bledsoe.)

A. Well, he didn't answer those letters or communicate with the office about them and I don't believe that we had any more correspondence with him or any communication with him until he arrived here for trial. Just let me check my time sheets on that. I might be able to tell you fairly accurately. The time sheets are so small I can't find them half of the time.

Well, following the trial I think he went back to Minnesota and I wrote him, sent him a letter about the result of the motion for a new trial and telling him about the time he would have to take any further action in the matter if he wanted [144] to get counsel to represent him in the matter and advised him that the insurance company would take the position that the policy did not cover, which I had previously advised him in our conversation before trial. I made, explained the whole thing before trial.

Q. What was the date of that last letter, sir?

A. October 25, 1948.

Mr. Boyd: I have no further questions.

Mr. Heafey: That is all. Defendant rests, your Honor.

Mr. Boyd: Your Honor please, in rebuttal we would like counsel for the defendant to produce the copy of the application that was signed by Mr. Mehlin for this insurance policy that we made a motion before Judge Goodman, and that counsel product it. Do you have it here, counsel?

Mr. Bledsoe: Yes, here's the whole thing.

Mr. Boyd: May we introduce the entire matter in evidence?

Mr. Bledsoe: Yes, you don't need that opening letter.

Mr. Boyd: At this time, your Honor please, I would like to offer in evidence the photostatic copy of the affidavit signed by Mr. Mehlin for this policy of insurance.

The Clerk: Plaintiff's exhibit 2 in evidence.

(Whereupon the application for insurance was received in evidence and marked plaintiff's exhibit No. 2.)

Plaintiff's exhibit No. 1

1947 State Farm Mutual Automobile Insurance Company of Bloomington, Ind.

and as an inducement to enter into the foregoing agreement represents the following statements by him to be correct and truthful.

APPLICANT Wilbur Wenlin (Applicant Sign Here) DATE OF BIRTH 8-23-1918
 OFFICE ADDRESS 210 No. 29th St. (Print name of applicant here. Indicate if co-partnership, corporation or estate)
Issued

Number _____ Street or R. R. _____ City _____ County _____ State _____

Automobile principally used? _____

Applicant's occupation or business: Assembly man

Address of employer? Cushman Motor Works, Lincoln ^{(If married, woman give}

Aug. 22, 1947 TOWNSHIP _____ TERRITORY No. 352

_____ hereby certifies that the applicant to insure in the Company for the coverages specified below and the premium and the license applied for shall be

NATIONAL STANDARD COMBINATION POLICY		Membership	Premium	FULL SERVICE POLICY		Membership	Premium
INJURY LIABILITY				A—DAMAGE BY THE AUTOMOBILE			
BODILY DAMAGE LIABILITY	\$	\$		BODILY INJURY LIABILITY			
THEFT (Including Fire & Theft)	\$	\$		PROPERTY DAMAGE LIABILITY			
STORM, THEFT	\$	\$		MEDICAL PAYMENTS			
ON—80%	\$	\$		BAIL BOND EXPENSE			
ON — \$ Deductible	\$	\$		B—DAMAGE TO THE AUTOMOBILE			
				COMPREHENSIVE (Including Fire & Theft)	\$	\$	
				COLLISION—80%			
				THEFT RENTAL REIMBURSEMENT			
				EMERGENCY ROAD SERVICE			
				SPECIAL SERVICE POLICY			
				Identical with the Full Service Policy EXCEPT the Collision coverage part for new			
				lost in excess of \$			
				Indicate \$25 \$50, or \$100 Deductible	\$	\$	
				STANDARD SERVICE POLICY			
				Identical with the Full Service Policy EXCEPT there is no Collision coverage	\$	\$	
				BASIC SERVICE POLICY			
				Provides protection for damage by the automobile only—Medical Payments and Liability	\$	\$	
				COMPREHENSIVE FARM LIABILITY	\$	\$	
				FARM EMPLOYER'S LIABILITY	\$	\$	
				COMPREHENSIVE RESIDENCE AND PERSONAL LIABILITY	\$	\$	
				TOTAL	\$	\$	

description of the automobile and the facts respecting its purchase are as follows.

Name and Model	Year of Model	Body Type: Truck Load Capacity or Factory Gross Weight	No. of Cyls.	Serial Number	F.O.B. List Price or Delivered price at Factory		
Ford	1936	2-dr.	8	Motor Number 2922986	520.00		
Automobile is in good condition except as follows:			Actual Purchase Cost	Purchased		If Automobile is Mortgaged (What is Amount of Mortgage?)	
				Month	Year	New Used	
			350.00	1	1936	X	

1. Was automobile purchased? Lester F. Brown Address Lincoln, Nebraska 821 S. 18
 2. Name of mortgagee First National Bank Address Lincoln, Nebraska
 3. Any other insurance on the described automobile? NO If so: Kind _____ Amount \$ _____
 4. Company _____ Expiration Date _____
 5. Insurer cancelled or refused to renew any kind of automobile insurance for the applicant during the past year? NO If so, explain fully: _____

7. ☐ Emission permit, operators license or registration been revoked?

accidents or losses has applicant had in past two years? no Give details _____

licant live on and operate a farm of five acres or more? no What is Applicant's race and color? white

Name and Age of other drivers. Authorized

IDENTITY SIGNATURE Julius G. Ludlam 2661

AGENT'S SIGNATURE _____
Fred Deyke 21

AGENT—STAMP NAME, ADDRESS HERE

QUESTIONS ON THE REVERSE SIDE OF THIS APPLICATION
MUST ALSO BE ANSWERED

1990



210	Linc
Nebr	
Lanc	
Asse	
2-22	Ford
51-01	B-22
canc.	282C
LINES ON:	
ESTIMATED	
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INC. RES.	
T.M.	
ENDORS	
FINANC	
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TO	
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TRANS	
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SUP. PA	

DESCRIPTION OR LOCATION OF ALL FARMS OWNED BY, RENTED TO, OR IN CHARGE OF NAMED INSURED OR SPOUSE TO BE INSURED HEREUNDER.						
COVERAGE	Exact Location	Type of Farming	Acres	Membership Fee	Premium	
	Comprehensive Farm Liability					
Farm Employer's Liability	Maximum No. of Employees	Estimate Number of Employee Months	Rate Per Employee Month			

- ## COMPREHENSIVE RESIDENCE AND PERSONAL LIABILITY

FOLLOWING INFORMATION REQUIRED WHEN APPLYING FOR EITHER OF ABOVE COVERAGES

The names of additional Insureds, other than the applicant, spouse, and minor children, to be covered hereunder are:

Describe fully any business or occupational pursuit conducted on the above designated premises, such as kind, manufacture, retail or wholesale, number of employees, annual dollar volume, if seasonal, number of months, etc. _____

The interest of the insured in the premises is _____ (owner or tenant).

The insured occupies the entire premises, except as follows:

No explosives will be made except as provided in the previous, except as follows:

Are the premises in good repair and condition?

Has any insurer cancelled or refused to renew any of your insurance during the past two years?

TRUCK INSPECTION REPORT

THIS REPORT IS TO BE MADE ON EVERY APPLICATION FOR INSURANCE ON A TRUCK AND EVERY QUESTION MUST BE ANSWERED

What was combined cost of chassis and body with new? _____ if so, how often?

| truck usually driven by the owner? | Yes |

Who besides the owner drives the truck?

What is driver's age? _____ What is driver's age in years? _____

truck used exclusively in connection with the operation and maintenance of
lictholder's farm?

truck used for hauling farm products or livestock.

so, for whom besides policyholder?

truck used in hauling other commodities

so, kind and for whom?

truck used for retail delivery of dairy products'

truck used for general hauling, delivery, express or transfer

plain fully

truck is used for hire, explain to what extent

Where is the truck regularly kept?

truck operated beyond a radius of 50 miles of garage location?

Applicant's protection begins with **EFFECTIVE DATE** shown in the **APPLICATION**

Entered: Filed: January 6, 1946



Mr. Boyd: I don't desire to read the entire affidavit, your Honor. I think it may be stipulated, may it not, counsel, [145] that the application for this policy of insurance discloses that at the time the insurance was applied for there was disclosed the fact that a mortgage existed on this automobile to the First National Bank of Lincoln, Nebraska.

Mr. Heafey: No question about it.

Mr. Boyd: Plaintiff rests, your Honor.

Mr. Heafey: Just one moment. May I have one second, your Honor?

Mr. Boyd: Your Honor please, it has been stipulated between counsel that the criminal proceedings referred to against Claggett were as a result of the manslaughter charge resulting from the accident and had nothing to do with any theft of the automobile or anything of that character.

The Court: Nothing to do with what?

Mr. Boyd: With the theft of an automobile or any criminal charge that would even indicate that Claggett had taken the car. The criminal proceedings referred to were entirely the result of the police action as a result of this action in which Mr. Porter was killed, that it was a manslaughter charge.

The Court: That so stipulated?

Mr. Heafey: Yes, your Honor. Counsel, I notice here among the papers sent out, a non-waiver agreement signed by Mehlin. Any objection to introducing that in evidence to complete the record?

Mr. Boyd: No. [146]

Mr. Heafey: We will offer in evidence, your Honor, a non-waiver agreement which is in the same form as that heretofore read, signed by Mr. Claggett.

The Court: This is signed by Mr. Claggett. Which form do you mean?

Mr. Heafey: The form that was signed in Minnesota.

The Court: I see.

Mr. Heafey: Not the letter.

The Court: That is exhibit A?

Mr. Heafey: Yes, and this was signed by Wilbur M. Mehlin and Carol Doris Mehlin at Lincoln, Nebraska, on the 25th day of August, 1948. We offer that in evidence.

The Clerk: Defendant's exhibit C, in evidence.

(Whereupon the non-waiver agreement was received in evidence and marked defendant's exhibit C.)

DEFENDANT'S EXHIBIT C

Notice and Acknowledgment of Non-Waiver of Rights

It is hereby understood and acknowledged by and between the State Farm Mutual Automobile Insurance Company of Bloomington, Illinois, and Wilbur Mehlin and Mrs. Carol D. Mehlin that any action taken by the said Insurance Company in investigating and/or attempting to adjust, and/or defending any claim, and/or handling any litigation

growing out of an accident involving: Bertha Lee Porter and others which occurred on or about Oct. 31, 1947, at Berkeley, California, shall not be construed as a waiver of the right of the said Insurance Company to deny liability at any time under any policy or policies of insurance issued to Wilbur Mehlin and Mrs. Carol D. Mehlin. Nor shall the acknowledgment of this notice be considered a waiver of the rights, under said policy or policies, of the said Wilbur Mehlin and Mrs. Carol D. Mehlin.

Dated at Lincoln, Nebr., this 25th day of August, 1948.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY.

Witnessed:

By /s/ GEORGE HEALEY.

Acknowledged by:

/s/ WILBUR M. MEHLIN,

/s/ CAROL DORIS MEHLIN.

Non-Waiver

[Endorsed]: Filed January 6, 1949.

Mr. Boyd: Now, at this time, your Honor please, I have two motions I would like to make. First, that the affidavit of Paul Dana that has been introduced in evidence be stricken from the record

and the jury instructed to disregard the contents thereof on the grounds that it is purely hearsay and the plaintiff has not had the right of cross-examination.

The Court: Well, I will deny that motion.

Mr. Boyd: Would also like to move at this time to strike all the evidence pertaining to the mortgage of the automobile by the insured Mehlin to the First National Bank on the ground [147] that there is no evidence in this record as to whether or not the mortgagor did or did not object or permit the plaintiff—the wife of the defendant, Mrs. Mehlin, to remove the automobile from the state of Nebraska.

The Court: What have you got to say about it?

Mr. Heafey: That was related to the proposition of intent, to show that—rather to the matter of permission and not show simply that at the time the policy was taken out there was a mortgage that was disclosed. It was at the time the car was taken out of the state there was an existing mortgage on that, a chattel mortgage on the car at the time it was taken out of the state, which would negative, in a sense, the giving of permission by Mr. Mehlin, because to do so would constitute a crime.

Mr. Castro: That is not a correct statement of the law.

The Court: Your answer to that proposition may be, Mr. Heafey, that as you understand the law of the state of Nebraska, was that it was a

crime to take the automobile out of the state without the permission of the mortgagor?

Mr. Heafey: That is right, your Honor.

The Court: There is no evidence here that the mortgagor refused such permission.

Mr. Boyd: That is right, no evidence one way or the other they either gave permission or refused to give permission.

Mr. Heafey: There is really evidence—there wasn't, [148] your Honor, because counsel stipulated that the record shows the charges were dismissed for insufficiency of the evidence, which we feel would be evidence, no question about the taking it out of the state——

The Court: I will let the evidence stand. You both can, you both can argue if you want to. The jury is fully advised that the law of the state of Nebraska didn't prohibit taking the automobile out of the state even though it was under a chattel mortgage, unless the mortgagor refused to consent thereto.

Mr. Heafey: I wonder if it isn't the other way, you can't take it out unless you have the prior consent?

The Court: That is what I mean. In other words, the law of Nebraska is that is that you couldn't take the chattel mortgage, the automobile, out of the state unless you had the consent of the chattel mortgagor. There is no evidence in this case one way or the other whether or not the chattel mortgagor gave his consent.

Mr. Boyd: We have nothing further, your Honor.

The Court: Yes. Well, you gentlemen for the defense, have you anything further?

Mr. Healey: No, your Honor, except we have a motion we would like to argue which will take a little time.

The Court: All right, then. Ladies and gentlemen, you will be excused from the court room and be asked to return to [149] the jury room to be sent for. In the meantime, please bear in mind the admonition I have heretofore given you. You may leave the court room now.

(The jury retired from the court room.)

Mr. Bledsoe: At this time the defendant moves for a directed verdict on the following grounds:

1. That there is no evidence in this case to show that the insurance policy extended coverage to Claggett, who is the only person against whom a judgment has been obtained.

2. That there is no evidence that Wilbur Mehlin, the named insured under the policy ever gave permission, either express or implied, to Claggett to use the car at the time and place of the accident.

3. The evidence is conclusive as a matter of law that Claggett was using and driving the car at the time and place of the accident without the permission or consent of Wilbur Mehlin, either express or implied.

4. The evidence shows that the declaration of the principal place of use and garaging was violated and constituted a material breach of the policy in that it shows that the vehicle was brought to the state of California with the intention of remaining here and using it in California, a place remote from the place declared in the policy to be the principal place of use and garaging.

5. That no acts or omissions by the defendants or any [150] of its agents have been shown to amount to an estoppel within the meaning of estoppel under the law.

6. No change in position in any material respect or at all has been shown by the plaintiff or on the part of the plaintiff or on the part of the assured or any assured in reliance of anything that the defendant did or did not do or that any of its agents did or did not do.

7. That there has not been anything shown prejudicial to the plaintiff or to the assured so as to bring them within any estoppel rule.

8. There has been an entire failure of proof and there is no evidence to show that the defendant or any of its agents had knowledge of all the facts at the time of the alleged acts or omissions claimed to constitute a waiver or an estoppel.

9. That there has been no evidence of any waiver by the defendant or by any of its authorized agents.

10. There has been no evidence of any estoppel

established on the part of any defendant or any of its agents.

11. That there has been no proof or evidence of any authority shown in any agent of the defendant to waive defenses or to estop the company in connection with any of the acts or failures to act on the part of the defendant claimed to amount to a waiver or an estoppel.

12. There has been no authority shown in any agent of the company that dealt with Mr. Castro or with the plaintiff or [151] the assured to bind the company, in any matters amounting to a waiver of the policy provisions or an estoppel against the company or to effect a change in any of the terms of the policy.

13. That there is no evidence of any written endorsements on the policy waiving any of its defenses or estopping the company to claim the defenses now raised.

14. There is no evidence of any waiver or of any estoppel with reference to the defense of the principal place of use and garaging as being a violation of the declaration of the policy.

I think that covers the grounds.

(Whereupon followed argument on the motion for a directed verdict.)

(Whereupon the ruling of the Court was as follows:)

The Court: Well, I prefer to proceed and let you gentlemen argue it to the jury.

I will outline to you, required under the rules, what the instructions will cover. They, of course, will cover the questions that—besides the general instructions, in order to recover in this case the plaintiff has the burden of proof showing it is an implied or expressed permission on the part of the named insured for Claggett to use that car the night of the accident. Then there will be the definition of implied permission, and then I will instruct the jury there isn't a presumption, merely an inference which can be dispelled by [152] virtue of having possession of the car, following the Ingstrom case. Then I will instruct the jury that the plaintiff is contending that the provision about permission is a condition and that the insurance company, by its conduct, has waived that condition, is estopped to assert it, then I will give them the rules of evidence, rules of law with respect to estoppel and waiver, including the statement in the instructions that there must be knowledge on the part of the person who is claimed to have waived, claimed to have been estopped, that that knowledge may be constructive or actual, and then I will give them the instruction to the effect that anything that this—that Mrs. Porter stands in the shoes of Claggett and that anything that Claggett did can bind her and that particularly after it was done and if there was any estoppel in this case it must have arisen out of facts which occurred previous to the signing of these waivers. And furthermore, the burden is

upon her to show, in order to prove an estoppel or a waiver, that she suffered some change of position from the acts of the defendant. Generally I am telling you those things so that you can have them in mind in your arguments to the jury.

Let us get the jury back.

Mr. Bledsoe: One thing that occurred to me that I forgot about, that is an additional ground, that the evidence shows that the policy provision, the declaration about principal place of garaging and use has been violated and [153] constitutes a violation of the terms of the policy. I don't know that I recall I included that in my grounds.

Mr. Castro: Yes, you did.

The Court: You included that in your instructions, but I have eliminated any reference to that because it doesn't seem to be an issue in this case.

We will take a recess for ten minutes.

Mr. Bledsoe: For the record, are you reserving ruling on the motion for directed verdict?

The Court: No, I am denying it.

(Brief recess.)

(The following proceedings were had in the presence of the jury.)

The Court: Proceed with your opening argument.

(Whereupon argument to the jury was made by Mr. Boyd.)

The Court: We will now take an adjournment, ladies and gentlemen of the jury, until a quarter

of two and in the meantime during the recess will you bear in mind the admonition that I have heretofore given you.

(Whereupon an adjournment was taken until 1:45 p.m. this date.)

* * *

[Endorsed]: Filed April 25, 1950. [154]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL.

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or a true and correct copy of orders entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Attorneys for the Appellant, to wit:

Complaint and Demand For Trial by Jury.

Answer of Defendant The State Farm Mutual Automobile Insurance Company to Complaint—Contains Exhibit “A.”

Verdict.

Judgment on Verdict.

Notice of Motion for Judgment and of Motion for New Trial.

Minute Order of March 21, 1950—Order Denying Defendants' Motion for Judgment Notwithstanding the Verdict, Order Denying Motion for New Trial.

Memorandum Opinion.

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

Notice of Denial of Motion for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

Plaintiff's Exhibits Nos. 1 and 2.

Defendant's Exhibits Nos. A, B and C.

Reporter's Transcript for January 4, 5 and 6, 1950.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 29th day of April, A.D. 1950.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12,531 United States Court of Appeals for the Ninth Circuit. State Farm Mutual Automobile Insurance Company, a Corporation, Appellant vs. Bertha Lee Porter, as Special Administratrix of the Estate of Charles E. Porter, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed April 29, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12,531

STATE FARM MUTUAL AUTOMOBILE IN-
SURANCE COMPANY, a Corporation,
Appellant,

vs.

BERTHA LEE PORTER, as Special Administra-
trix of the Estate of Charles E. Porter, de-
ceased,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant intends to rely on the following points:

1. The evidence is insufficient as a matter of law

to establish that the insurance policy extended coverage to Claggett, who is the only person against whom a judgment was obtained in the tort action.

2. The evidence is insufficient as a matter of law to establish that Wilbur Mehlin, the named insured under the policy, ever gave to Claggett permission, either express or implied, to use the vehicle described in the policy at the time and place of the accident.

3. The evidence established as a matter of law that Claggett was using and driving the vehicle described in the policy at the time and place of the accident without the permission or consent of Wilbur Mehlin, either express or implied.

4. The evidence shows, as a matter of law, that there was a material and substantial breach with respect to the declaration of principal place of use and garaging described in the policy and shows, further, that the vehicle described in the policy was brought to the State of California for the purpose of being permanently used and garaged in said state at a place remote from the place declared in the policy to be the principal place of use and garaging.

5. The evidence shows, as a matter of law, that no acts or omissions by appellant or defendants or any of their agents amounted to or constituted an estoppel or established facts sufficient to estop appellant from denying liability under the policy.

6. The evidence shows, as a matter of law, that neither appellant nor anyone on its behalf performed or failed to perform any act which in any way caused any change of position in any material

respect by appellee or anyone on her behalf or on the part of the assured or any assured or anyone on behalf of any such assured.

7. The evidence is insufficient as a matter of law to show that appellee or the assured or anyone on their behalf, respectively, has been in any way prejudiced by any act of appellant or anyone on its behalf.

8. The evidence is insufficient as a matter of law to show, and there has been an entire failure of proof to show, that appellant or anyone on its behalf had knowledge of all material facts at the time it, or anyone on its behalf, performed any of the acts or omissions claimed by appellee to constitute (i) a waiver by appellant of any defenses under the policy or (ii) an estoppel of appellant to deny liability under the policy.

9. The evidence is insufficient as a matter of law to show any waiver by appellant or anyone on its behalf.

10. The evidence is insufficient as a matter of law to show any estoppel on the part of appellant or anyone on its behalf.

11. The evidence is insufficient as a matter of law to establish any authority in any agent or claimed agent of appellant to waive any defenses of appellant under the policy, or to estop appellant in connection with any claimed acts or failures to act on the part of appellant, or anyone on its behalf.

12. The evidence was insufficient as a matter of law to establish that any written endorsements on

the policy waived any defenses or constituted any estoppel of appellant.

/s/ LEIGHTON M. BLEDSOE,

DANA, BLEDSOE & SMITH,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 5, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
DEEMED BY APPELLANT TO BE NEC-
CESSARY FOR CONSIDERATION OF THE
APPEAL

Appellant designates, pursuant to Rule 19 of this Court, the following parts of the record deemed necessary for consideration of the appeal:

1. Complaint.
2. Answer.
3. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received in evidence, all motions and applications made during the trial and the rulings thereon.
4. The verdict of the Jury and Judgment entered thereon.
5. Motion of Defendant The State Farm Mutual

Automobile Insurance Company (a corporation) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

6. Minute order denying motion of defendant The State Farm Mutual Automobile Insurance Company (a corporation) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

7. Memorandum Opinion of the trial court filed March 21, 1950.

8. Reporter's Transcript.

Note: The Reporter's Transcript refers to but does not include the text of certain depositions introduced in evidence and read to the jury; in order that such depositions may be printed as part of the Reporter's Transcript, we have filed herewith a document entitled "Designation of Page Sequence to be Used in Printing Reporter's Transcript and Depositions Admitted in Evidence" indicating the order in which the respective pages of the Reporter's Transcript and of the depositions should be printed.

9. Notice of Appeal to United States Court of Appeals for the Ninth Circuit.

10. Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

11. Designation of Parts of Record Deemed by the Appellant to be Necessary for Consideration of the Appeal.

12. All other records required by the provisions

of Rule 75, Subdivision (g), of the Federal Rules of Civil Procedure.

/s/ LEIGHTON M. BLEDSOE,

DANA, BLEDSOE & SMITH,

Attorneys for Appellant.

Receipt of Copy Attached.

[Endored]: Filed May 5, 1950.

No. 12,531

IN THE

United States Court of Appeals
For the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE IN-
SURANCE COMPANY (a corporation),
Appellant,

VS.

BERTHA LEE PORTER, as Special Ad-
ministratrix of the Estate of Charles
E. Porter, Deceased,
Appellee.

APPELLANT'S OPENING BRIEF.

LEIGHTON M. BLEDSOE,
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440 Montgomery Street, San Francisco 4, California,
Attorneys for Appellant.

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Subject Index

	Page
Statement of pleadings	1
Statement of jurisdictional facts.....	1
Statement of questions involved.....	3
Specifications of error.....	5
Statement of facts	8
Summary of argument	16
Argument	18

I.

Some preliminary fundamentals pertinent to this case are well established	18
A. The burden of proving coverage on the driver, Claggett, was upon the plaintiff (appellee).....	18
B. Since the insurance contract was made in Nebraska, the law of that state applies.....	19
C. Under Nebraska law the burden of proving extension of coverage to a person not named in the policy was upon appellee	19
D. The appellee as a third party claimant must stand in the shoes of Claggett, and if there was no coverage on him, appellee cannot recover.....	20
E. The reasons for limiting coverage under omnibus clauses to persons given permission by the named insured, and for requiring adherence to declarations about principal place of use and garaging of the vehicle are not the subject of debate and cannot be subjected to critical analysis. The parties may contract on their own terms and third parties cannot chip away the terms of the agreement.....	22

II.

Since the insurance policy did not name the judgment debtor, Claggett, the evidence was insufficient to establish permissive use in Claggett so as to extend coverage to him under the omnibus clause of the policy.....	23
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

	Page
III.	
The evidence was insufficient, as a matter of law, to establish either waiver or an estoppel with respect to permissive use	27
IV.	
The provisions of the policy against waiver and estoppel except in writing and except by duly authorized officers are valid provisions and are recognized as such by the cases...	37
V.	
Insurance coverage cannot be extended by means of waiver or estoppel. A failure of proof to bring someone within the coverage provisions of the policy likewise cannot be supplied by waiver or estoppel.....	41
VI.	
The declaration concerning the principal place of use and garaging of the vehicle was breached when the wife brought the vehicle to California with the intention of remaining here	50
Conclusion	54

Table of Authorities Cited

Cases	Pages
Allen v. Home Ins. Co. (1901), 133 Cal. 29, 65 Pac. 138.....	18
American Fire v. Landfare, 76 N.W. 1068 (Neb.).....	40
Antone v. New Amsterdam, 6 Atl. (2d) 566 (Pa.).....	46
Aronson v. Frankfort, 9 Cal. App. 473.....	28
Boyer v. U.S.F. & G., 206 Cal. 273.....	23
C.I.T. v. American Central Insurance Company, 18 Cal. App. (2d) 673	51
Card v. Minn., 298 N.W. 157 (Neb.).....	22, 39, 42
Carnes & Co. v. Employers, 101 Fed. (2d) 739.....	44
Chester Pyle Co. v. Fossler, 200 Cal. 204.....	27
Cohen v. Metropolitan Insurance Co., 32 Cal. App. (2d) 337	19, 30
Col. Cas. Co. v. Lyle, 81 Fed. (2d) 281.....	20, 26
Commercial Standard v. Robertson, 159 Fed. (2d) 405.....	33, 45
Connecticut Indemnity Co. v. Howe, 41 Fed. Supp. 222.....	53
Conner v. Union Automobile Ins. Co., 122 Cal. App. 105....	41
Cronan v. Travelers Ind., 18 Atl. (2d) 13.....	20
Demy v. Royal Indemnity, 159 N.E. 107.....	19, 48
Engstrom v. Auburn, 11 Cal. (2d) 64.....	26
F. & G. Fire Corp. v. Bilquist, 99 Fed. (2d) 333 (9th Cir.)...	46
Fidelity Mutual Fire v. Lowe, 93 N.W. 749.....	39
Fox v. Crawford, 80 N.E. (2d) 189.....	20, 26
Frederiksen v. Employers, 26 Fed. (2d) 76 (9th Cir.).....	20, 26
Gajanich v. Gregory, 116 Cal. App. 622.....	26
George v. Guarantee Mut. Life Co., 13 N.W. (2d) 176.....	30
General Casualty v. Kierstad, 67 Fed. (2d) 523.....	21
German Ins. Co. v. Heidink, 46 N.W. 481, 30 Neb. 288.....	39
Gladding v. C.F.M.F., 66 Cal. 6.....	38
Hamilton v. Home Ins., 61 N.W. 93, 42 Neb. 883.....	30
Hanchett v. Wiseley, 107 Cal. App. 230.....	27
Hancock v. Dorman, 108 Fed. (2d) 220.....	19
Hargett v. Gulf Ins. Co., 12 Cal. App. (2d) 449.....	38
Harrell v. Peoples City Mission, 267 N.W. 344.....	27

	Pages
Haschenberger v. Dennis, 225 N.W. 25 (Neb.)	33
Heime v. Glens Falls Ins. Co., 222 N.W. 731 (Mich.)	42
Hodges v. Ocean Acc. & G. Corp., 18 S.E. (2d) 28	35
Home Ind. Co. v. Standard Accident Ins. Co., 167 Fed. (2d) 919 (9th Cir.)	21, 22, 48
Hynding v. Home Ins. Co., 214 Cal. 743	21
Imperial Fire Ins. Co. v. Coos County, 151 U.S. 452, 38 L. Ed. 231	22
Jensen v. New York Life, 59 Fed. (2d) 957 (Neb.)	39
John Hancock etc. Ins. Co. v. Markowitz, 62 Cal. App. (2d) 388	41
Johnson v. Caledonian Ins. Co., 251 N.W. 821 (Neb.)	22, 53
Kabinski v. Employers Liab., 8 Atl. (2d) 605 (N.J.)	49
Kambourian v. Gray, 81 Cal. App. (2d) 783	26
Kellner v. Travelers Ins. Co. (1919), 180 Cal. 326, 181 Pac. 61	18
Kimbles v. Kelly, 6 Cal. App. (2d) 91	26
Kindred v. Pacific Auto., 10 Cal. (2d) 463	50
Klanecky v. Woodmen, 254 N.W. 577, 126 Neb. 809	30
La Roche v. Farm Bureau Mutual, 7 Atl. (2d) 361 (Pa.) ..	36
Lavine v. Ind. Ins. Co. of N. A. (1933), 260 N.Y. 399, 183 N.E. 897	18
Locke v. General Accident, 279 N.W. 55	20, 26
Lummus v. Fireman's Fund, 83 S.W. 688	52
Macomber v. Minn. F. & M., 204 N.W. 331	42
Manthery v. Am. Auto. Ins. Co. (1941), 127 Conn. 516, 18 Atl. (2d) 397	18
Marone v. Hartford, 176 A. 320	52
McDanels v. General Ins. Co., 1 Cal. App. (2d) 454	28, 32
McElroy v. Metropolitan Life, 122 N.W. 27	39
Metropolitan Cas. Ins. Co. v. Colthurst (C.C.A. 9th), 36 Fed. (2d) 559	21
Mirich v. Underwriters at Lloyds, 64 Cal. App. (2d) 522 ..	29
Montanya v. Brown, 31 Cal. App. (2d) 642	26
Myeek v. Hartford Acc. & Ind. Co., 128 Conn. 140, 20 Atl. (2d) 735	19
Myers v. McMaken, 276 N.W. 167 (Neb.)	27

TABLE OF AUTHORITIES CITED

v

Pages

Nash v. Baker, 58 N.W. 706, 40 Neb. 294.....	30
National Aid v. Brachter, 91 N.W. 379 (Neb.), 93 N.W. 1122	33
National Auto Ins. Co. v. Indus. Acc. Com., 11 Cal. (2d) 689	23
North River Ins. Co. v. Lewis, 119 S.E. 43.....	52
Northern Assurance Co. v. Grand View, 183 U.S. 108, 46 L.Ed. 213	40
Oak Creek Bank v. Helmer, 80 N.W. 891 (Neb.).....	33
Philleo v. Hefnider, 2 N.W. (2d) 31 (Neb.).....	27
Pickens v. Maryland Cas. Co., 2 N.W. (2d) 593 (Neb.)....	22, 39
Pierce v. H. Life Assn., 272 N.W. 543.....	44
Pritchard v. Norton, 106 U.S. 124, 27 L.Ed. 104.....	19
Purcell v. Pacific Auto., 19 Cal. App. (2d) 230.....	50
Rosenberg v. General Accident, 246 S.W. 1009 (Wis.).....	44
Royal Ind. v. Watson, 61 Fed. (2d) 616.....	21, 34
Sanks v. St. Paul, 267 N.W. 454.....	53
Sawyer v. Sovereign Camp, 181 N.W. 191, 105 Neb. 395....	30
Sears v. Illinois Ind. Co., 121 Cal. App. 211.....	21
Sides Estate, 119 Neb. 314, 228 N.W. 619.....	25
State v. Cheyenne Co., 241 N.W. 747, 123 Neb. 1.....	27
Suydam v. Public Ind. Co., 161 Atl. 449 (N.J.).....	36
Trotter v. Union Ind., 35 Fed. (2d) 109 (9th Cir.)	20, 26
U. S. F. & G. v. Mann, 73 Fed. (2d) 465.....	20, 26
Valladao v. Fireman's Fund, 13 Cal. (2d) 322	21
Van Meter v. Franklin Fire, 164 Fed. (2d) 325 (9th Cir.)	45
Washington Nat. Ins. Co. v. Craddock, 109 S.W. (2d) 165 (Texas)	42
Weissbaum v. Eibeshutz, 211 Cal. 170	26
Western Machinery Company v. Bankers Ind. Co., 10 Cal. (2d) 488	20
Wigington v. Ocean Accident, 120 Neb. 162, 231 N.W. 770	20, 26, 34, 35
Williams v. Neely, 134 Fed. 1	30
Witthauer v. Paxton-Mitchell Co., et al., 19 N.W. (2d) 865..	27

Statutes

	Pages
Insurance Code:	
Section 442	51
Section 444	52
Section 445	52
Nebraska Statutes of 1943, Volume 3:	
Section 44-378	19, 25
Nebraska Statutes of 1947:	
Section 42-601	25
Section 42-604	25
Title 28 U. S. Code:	
Section 1291	2
Section 1332	2

Texts

78 A.L.R. 883 at 889-90, note	19
29 Am. Jur. "Insurance" paragraph 855	31
Appleman on Insurance, Vol. 4, page 528.....	52
32 C. J. 1317	43
45 C.J.S. 617, note 39	41, 49

No. 12,531

IN THE

**United States Court of Appeals
For the Ninth Circuit**

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (a corporation),

Appellant,

VS.

BERTHA LEE PORTER, as Special Administratrix of the Estate of Charles E. Porter, Deceased,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF PLEADINGS.

STATEMENT OF JURISDICTIONAL FACTS.

This is an appeal by the defendant below, State Farm Mutual Automobile Insurance Company, from a final judgment against it based upon a verdict for \$11,023.31. (Tr., p. 54.)

The action was between—Porter, a California citizen and resident, and State Farm Mutual Automobile Insurance Company, a citizen of the State of Illinois. The suit was on an insurance policy, and jurisdiction of the trial Court was based on diversity of citizen-

ship and an amount in controversy exceeding \$3000. (28 U. S. Code, Section 1332.) (Tr., pp. 2 to 10.) The jurisdiction of this Court is based on an appeal from a final judgment entered in a United States District Court (San Francisco) under Title 28, U. S. Code, Section 1291. (Tr., pp. 64, 67 to 70.)

The complaint (Tr., pp. 2 to 10) was in two counts. Both counts were based upon a final judgment obtained by plaintiff (appellee) in a California Superior Court against a man named Claggett. The first count alleged that Claggett was an additional assured under the omnibus provisions of appellant's insurance policy, by virtue of a permitted use of the insured vehicle claimed to have been given by the *named* insured and his wife.

The second count alleged that the insurance company was estopped to deny, and had waived the right to claim, noncoverage of Claggett by virtue of certain conduct of its agents and attorneys following the accident caused by Claggett's use of the automobile. (Tr., pp. 5 to 10.)

The answer denied that coverage on Claggett had existed, on the ground that no permission had been given by the *named insured* to Claggett. (Tr., pp. 11 to 14.)

The answer also set up as separate defenses:

1. Breach of a declaration that the car insured would be principally garaged and used in Lincoln, Nebraska. (Tr., p. 12.)

2. That the policy itself restricted the method by which, and the persons by whom, a waiver or estoppel could be accomplished and such conditions had not been fulfilled. (Tr., p. 15.)

3. Lack of sufficient knowledge in the defendant of all the facts to permit the working of an estoppel or waiver against it at the time of the alleged conduct claimed to have constituted a waiver or estoppel. (Tr., pp. 19 and 20.)

4. The securing of a reservation of rights agreement from Claggett before commencing the trial in the State Court and the advising of plaintiff's counsel before said trial of the policy defenses discovered by the insurer. (Tr., pp. 25 to 27.)

At the close of the plaintiff's case the defendant moved for a dismissal (Tr., pp. 106-107), and thereafter for a directed verdict (Tr., pp. 254 to 256), and for a judgment notwithstanding the verdict. (Tr., pp. 55 to 61.) These motions were denied. (Tr., pp. 257 and 67.) Notice of appeal was filed within the time required. (Tr., p. 70.)

STATEMENT OF QUESTIONS INVOLVED.

1. The evidence was insufficient as a matter of law to establish that the judgment debtor Claggett was operating the insured vehicle with the permission of the *named* insured so as to become an "insured" under the omnibus provisions of the appellant's insurance contract.

(The trial Court should have granted defendant's motion for a directed verdict and for judgment notwithstanding the verdict.)

2. The claim of waiver and estoppel to deny coverage on Claggett (the judgment debtor under the State Court judgment), was not established by plaintiff as a matter of law.

(The evidence was insufficient as a matter of law to establish the necessary prerequisites of a waiver or an estoppel and defendant's motions for a directed verdict and for judgment notwithstanding the verdict were well taken.)

3. The provisions of the insurance contract as to the methods by which and persons by whom a waiver or estoppel could be worked were not, as a matter of law, complied with.

(Such provisions in an insurance contract are valid and binding on injured parties seeking to recover on the insurance policy.)

4. Neither waiver nor estoppel can effect an enlargement of coverage, nor can they supply a failure of proof that Claggett had permission from the named insured to use the vehicle.

(The proof of permissive use, that is a prerequisite to making an unnamed person an insured, does not involve a breach of conditions or a forfeiture for non-compliance. Only the latter can be waived or disregarded because of estoppel.)

5. A declaration in the policy that the principal place of garaging and principal place of use of the insured vehicle would be in Lincoln, Nebraska, was violated when the car was brought to California with the intention of remaining here. Such breach constituted a policy violation and deprived the user of such vehicle of insurance protection under the policy.

SPECIFICATIONS OF ERROR.

The District Court erred in denying appellant's motions for a directed verdict and for judgment notwithstanding the verdict for the following reasons:

I. Plaintiff's right of recovery against appellant was predicated upon a State Court judgment against Claggett and it was not shown that appellant's insurance policy (upon which plaintiff's case was based) extended any coverage to said Claggett.

a. Because the insurance policy named only Wilbur Mehlin as insured and by definition included as "insured" "(a) the spouse of the named insured residing in the same household as the named insured,

(b) any other person but only while using the described automobile and any person or organization legally responsible for the use thereof provided the actual use of the described automobile is with the permission of the named insured." (Tr., pp. 76 and 77.)

b. And the evidence was conclusive that Wilbur Mehlin had not given permission to Claggett to use the vehicle.

c. And Mrs. Mehlin was not a judgment debtor under the State Court action and was not residing in the same household as the named insured at the time of the accident.

II. The evidence adduced did not establish the necessary elements of waiver or estoppel under the law or under the policy.

a. The conduct of the insurance company representatives, claimed as establishing waiver or estoppel, occurred before said representatives had any knowledge that the use of the vehicle by Claggett was against the wishes of the named insured and without permission.

b. No change of position, nor reliance nor detriment was shown, nor could be shown.

c. A nonwaiver agreement was taken from Claggett before trial in the State Court (Tr., pp. 229 to 235) and plaintiff was advised of it and of the policy defense prior to trial in the State Court (Tr., pp. 223, 227 to 238); but said plaintiff elected to proceed with the trial against Claggett alone, resisted a requested continuance of said trial, and obtained a judgment for \$30,000 against Claggett. (Tr., pp. 221 to 226, 227 to 228 and 5.)

d. The insurance contract required a defense or settlement of claims against the insured even if the suit was groundless and also provided that:

“Acts of the Company or its representatives in performing the duties or exercising the rights under this agreement shall not operate to waive the Company’s rights nor estop it from asserting any defense under the policy.” (Tr., p. 33.)

The insurance contract also provided:

“8. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy signed by an executive officer of the Company.” (Tr., p. 43.)

No endorsement had been issued changing or waiving coverage limitations of the policy, nor changing or waiving the provisions of section 8 above quoted. (Tr., pp. 30 to 53.)

III. The failure of proof of permissive use by Claggett could not, as a matter of law, be supplied by means of waiver or estoppel. Coverage could not be extended to Claggett by waiver or estoppel.

IV. A declaration in the policy, amounting to a warranty, was violated by the bringing of the described automobile to California with the intent to remain here. Said declaration was to the effect that the automobile would be principally garaged and used in Lincoln, Nebraska.

STATEMENT OF FACTS.

In August, 1947, appellant State Farm Automobile Insurance Company issued an insurance policy on a 1936 Ford owned by Wilbur Mehlin. The insurance contract was made in Lincoln, Nebraska. The only named insured on the policy was Wilbur Mehlin. (Tr., pp. 30 to 53.)

The insurance contract agreed to pay on behalf of the insured all sums the insured might become obligated to pay by reason of liability imposed on him by law. (Tr., p. 30.)

The company agreed to defend any suit against insured for damages, even though groundless, reserving the right to negotiate settlement. (Tr., p. 32.)

The insured was defined to include a person using the described automobile with the permission of the named insured. (Tr., p. 33.)

The policy provided that the agreement was made in reliance upon the statements in the declarations and that the agreement was subject to the exclusions and conditions and other terms of the policy. (Tr., p. 30.)

Declaration number 1 was that the automobile would be principally garaged and used in Lincoln, Nebraska. (Tr., pp. 50 and 51.)

Under "Supplementary Agreements" it was provided that acts of the Company or its representatives in performing the duties of defending and investigating or in exercising the right of settlement negotiation should not operate to waive the company's rights

or estop it from asserting any defense under the policy. (Tr., pp. 32 and 33.)

Under "Conditions" it was stated that no action would lie on the policy until the insured's obligation to pay had been finally determined. (Tr., p. 41.)

Condition 8 provided that notice to or knowledge of a company agent could not be used as a waiver or estoppel, unless an endorsement signed by an executive officer was issued. (Tr., p. 43.)

In addition to having the automobile insured, Wilbur Mehlin had placed a chattel mortgage on the car which prohibited its removal from the State of Nebraska without the consent of the mortgagee bank. (Tr., pp. 122 to 125 and 135.)

The following sequence of events that we are about to relate did not become known to the insurance company until shortly before trial of the case against Claggett in the State Court. (Tr., pp. 164 to 166.) The first *full* knowledge directly obtained from Mr. and Mrs. Mehlin came by way of sworn statements taken by the insurance company *after* the trial in the State Court. (Tr., pp. 168 to 171.) The evidence in the case at bar was produced by depositions of Mr. and Mrs. Mehlin taken in Nebraska as part of this present case. (Tr., pp. 126 to 151.)

The testimony of Mr. Mehlin established that he was the owner of the automobile and it was registered in his name. The mortgage on the automobile was in effect during October, 1947. On October 14, 1947 Mr.

Mehlin came home from work to find that his wife had left him, taking with her personal belongings and their only child and the insured automobile. She left without his prior knowledge or consent and she took the automobile without his knowledge or consent. He did not know where she had gone. He did not know Duane R. Claggett and had never heard of him. He testified that he did not give his wife permission to take the car from the State, nor to allow Claggett to drive it. (Tr., pp. 126 to 142.)

Two days after the disappearance of his wife Mr. Mehlin swore out a complaint for her arrest and started proceedings to have her return to Nebraska. *This occurred two weeks before the accident in question.* (Tr., pp. 133 to 135 and 146.)

Mrs. Mehlin testified in her deposition that she took the automobile without her husband's consent and left the State of Nebraska without his consent and without his knowledge. She left the State of Nebraska October 14, 1947, and drove to California with two men and her child. She took up residence in Richmond, California, with the Claggett family and allowed Duane Claggett to take the automobile for the purpose of having a date with a girl in Oakland. She testified that she did not have her husband's permission to drive the automobile to California; that when she left Nebraska it was her intention to come to California permanently and not to return to Nebraska. She did not have any business to transact in California on behalf of her husband, nor was Duane Clag-

gett transacting any business for her or her husband when the accident occurred. She had not known Duane Claggett before she arrived in California and she did not have a California operator's license. Under cross-examination Mrs. Mehlin testified that she had not driven the automobile very much in Nebraska and had used it just to go to town and to do the shopping. She testified that never before had she driven the car out of the city limits of Lincoln and never before had she allowed anyone else to drive the car, and she also testified that her husband told her not to let anyone drive the car. (Tr., pp. 143 to 151.)

Let us now pick up the story from the viewpoint of the insurance company. After the appellant company sold its policy to Wilbur Mehlin in Nebraska and received the premium, it heard nothing further about the life and tribulations of Mr. Mehlin until after the insured car became involved in an accident in California. When Duane Claggett had the accident someone reported the accident to the State Farm Insurance Company office in Berkeley. (Tr., p. 153; pp. 176 to 177.) An investigator from State Farm took a statement from Claggett in which he reported on the facts of the accident and stated that he had the permission of *Mrs. Mehlin* to operate the car at the time of the accident. The investigator then interviewed Mrs. Mehlin and secured from her a verbal statement that she was on a visit in California and would be here temporarily; that she had given permission to Claggett to use the car and she was the wife of the named insured, who was still in Nebraska. (Tr., pp. 192 to 194.)

Mrs. Mehlin had signed a printed form of the report of the accident setting forth the bare details in which she related she was the wife of the named insured and that Claggett was operating the described vehicle with her permission. Mrs. Mehlin did not know how the accident happened because she was not present when it occurred. (Tr., p. 145.)

The insurance company, through its assistant claims manager, endeavored to negotiate a settlement with the attorney for the plaintiffs commencing in December, 1947, and ending in February, 1948. During this period of time the attorney representing the plaintiffs was interviewed by an adjuster for the insurance company named Gripenstraw, whose authority was limited and who had been delegated to secure an extension of time to plead while negotiations were carried on. (Tr., pp. 208 and 213.) The question of permissive use was discussed with this adjuster and he is supposed to have stated that there was no question of permissive use involved, and that the company was satisfied in that regard. (Tr., pp. 86 to 87.) The company was offering \$7,500 in settlement and the plaintiffs were holding out for the limits of the policy, or at least \$9,750. (Tr., pp. 87 to 89.) There was no evidence that, during this period of negotiations, appellant's agents had any notice or knowledge of the circumstances of Mrs. Mehlin's departure from Nebraska.

When settlement negotiations were broken off at the end of January, 1948, the insurance company sent its file to its attorneys to appear for Claggett, who was

the only one served with summons and complaint. The attorneys filed an answer *on the basis of the information in the file* (Claggett's and Mrs. Mehlin's statements), in which it was admitted that Claggett was driving the vehicle with the permission of Wilbur Mehlin. (Tr., pp. 19 and 20.) This answer was filed in February, 1948, and was verified by Mr. Dana, one of the attorneys for the defendant. In April, 1948, Wilbur Mehlin received a letter from the insurance company advising him of the suit and of the fact that it was in excess of his policy limits and telling him he could get his own attorney if he wished to be separately represented. (Tr., pp. 161 and 163.) Apparently Wilbur Mehlin consulted attorneys Ginsburg & Ginsburg in Lincoln, Nebraska, and these attorneys wrote a letter to Dana, Bledsoe & Smith. This letter advised Dana, Bledsoe & Smith of the circumstances of the removal of the car from Nebraska by Mrs. Mehlin. Thereafter a legal and factual investigation was commenced which was incomplete at the time the case was scheduled to go to trial in Martinez in the early part of July, 1948. (Tr., pp. 24 and 104.)

On July 2, 1948, one of the attorneys in Mr. Dana's office was required to pick up the file for the first time in order to prepare it for trial, since a continuance had been refused. The answer filed by Mr. Dana was amended by leave of Court in order to deny that the vehicle was being operated by Claggett with the consent and permission of Wilbur Mehlin. (Tr., pp. 223 to 225.) Such a denial was filed and a week's continuance was had from July 7th to July 14th to

enable defendant Claggett to get to California from Minnesota. Before the continuance of the trial and on July 3, 1948, the attorneys for the plaintiffs were advised of the questionable coverage question and of the letter that had been received from Ginsburg & Ginsburg. (Tr., pp. 220 to 223.) Between July 3rd and July 13th an effort was made to reach Claggett and the Mehlin, but it was learned that these people were no longer in California. Claggett had left the State of California in March, 1948. (Tr., p. 238.) Mrs. Mehlin had been arrested in California in December, 1947, and returned to Nebraska. This arrest had been without the knowledge of the insurance company. (Tr., pp. 164 to 171.)

On July 9, 1948, a reservation of rights agreement was taken from Claggett in Nebraska and another one was taken from him upon his arrival in California on July 13th before the commencement of the trial. (Tr., pp. 229 to 235.)

The Court in Martinez and counsel for the plaintiffs were both advised before the commencement of the trial that there was a policy coverage question involved and the attorney for the plaintiffs waived a jury trial after learning this situation. (Tr., pp. 227 to 228.)

No serious settlement negotiations had been conducted between February, 1948 and the time of trial, since they had been broken off between the attorney for the plaintiffs and the insurance company toward the end of January, 1948. (Tr., pp. 88 and 89; pp. 90 to 96.)

When plaintiff rested she had proved nothing affirmatively about Claggett's having permission to use the car. In addition to that, plaintiff proved nothing concerning any notice or knowledge by any of appellant's agents concerning lack of permissive use.

The sequence of events in the light of the then existing knowledge is of considerable importance. It is important to realize that at the time the insurance company was investigating the accident and was negotiating with Mr. Castro a complaint had been filed not only against Claggett, but also against the named insured and his wife. (Tr., p. 87.) In addition to this the complaint had alleged not only an ownership liability by reason of permissive use, but also a master and servant relationship between Claggett and the Mehlin. It was apparent, therefore, that although no service had been effected upon the Mehlin, there was a potential liability exposure which required the insurance company to defend their interests even though the claims made might be groundless. Ostensibly, from the facts obtained, Mrs. Mehlin could still be regarded as a member of the named insured's household, since she stated that she was in California on a temporary visit. The insurance company was entitled to rely on such a statement.

Under the facts known to the insurance company up until April, 1948, during which period it is claimed that waiver and estoppel occurred, there was every indication that the wife was temporarily in California on a visit with the blessing of her husband, and that

she had given permission to Claggett for the use of the car.

In April, 1948, a different set of facts was learned, which was not conclusive, and which required research concerning Nebraska law, and which required confirmation by means of statements from both Mr. and Mrs. Mehlin. Claggett was obviously not in a position to throw light on the subject. Moreover, between April and July when the case was tried none of these people was in California and no representations were being made to Mr. Castro and no offers were being made to him at said time. (Tr., pp. 92 to 96.)

SUMMARY OF ARGUMENT.

In this action by a judgment creditor, not a party to the insurance contract, the burden of proving coverage was on the appellee.

Since we are dealing with a contract made in Nebraska, the law of that state governs—even on the subject of inferences and the dispelling of them.

Under Nebraska law the burden of proving that a policy protects a person not described is on the one claiming such an extension of coverage.

A third party who seeks to recover under an insurance contract must stand in the shoes of the person he claims to be an insured, and is bound by the defenses and the lack of coverage shown to have been existing at the time he steps into those “shoes”.

The reasons for policy restrictions and limitations cannot be inquired into, since the parties are free to make their contracts as they see fit.

Because the insurance policy did not name Claggett (the judgment debtor), it was necessary that appellee prove an extension of coverage by virtue of permission granted by the named insured.

Permission to use the car could not be inferred and even if it could, the evidence dispelled the inference as a matter of law.

Because the evidence failed to show that permission was given to Claggett by the named insured, an attempt to extend coverage to Claggett by means of waiver or estoppel was made by appellee.

As a matter of law the evidence fell short of establishing waiver or estoppel, because there was neither an intentional relinquishment of a known right (waiver), nor acts or declarations intended to mislead another and on which that other has relied to his detriment (estoppel).

The burden of proving waiver and estoppel was on the appellee.

The insurance policy provisions limiting the method by which and the persons by whom the Company could be bound were valid, and binding on appellee. The evidence failed to establish waiver or estoppel within the requirements of the insurance contract.

Insurance policy violations or breaches of conditions may call for a forfeiture or suspension of cover-

age, and such violations can be waived; but neither waiver nor estoppel can be relied upon to extend coverage beyond the limits of the agreement nor can waiver or estoppel be used to supply a lack of evidence that permission to use the vehicle was given by the named insured.

The declaration as to the principal place of garaging and use of the insured vehicle was violated, precluding coverage at the time and place in question.

ARGUMENT.

I.

SOME PRELIMINARY FUNDAMENTALS PERTINENT TO THIS CASE ARE WELL ESTABLISHED.

A. The burden of proving coverage on the driver, Claggett, was upon the plaintiff (appellee).

In *Lavine v. Ind. Ins. Co. of N. A.* (1933), 260 N.Y. 399, 183 N.E. 897, it was said:

“The burden of proof rested upon the plaintiff to establish that the policy covered.”

See also:

Kellner v. Travelers Ins. Co. (1919), 180 Cal. 326 at 330, 181 Pac. 61;

Manthery v. Am. Auto. Ins. Co. (1941), 127 Conn. 516, 18 Atl. (2d) 397 at 399;

Allen v. Home Ins. Co. (1901), 133 Cal. 29, 65 Pac. 138.

This burden of proof exists where permission to use a vehicle is involved.

Denny v. Royal Ind. Co. (1927), 26 Ohio App. 566, 159 N.E. 107;

Myeek v. Hartford Acc. & Ind. Co., 128 Conn. 140, 20 Atl. (2d) 735.

B. Since the insurance contract was made in Nebraska, the law of that state applies.

It is uniformly held that the law of the place of contracting governs.

Cohen v. Metropolitan Life, 32 Cal. App. (2d) 337;

Hancock v. Dorman, 108 Fed. (2d) 220.

Even in the use or in the dispelling of inferences, the law of the place of contracting may be applied. This is true where substantive rights may be involved if an inference of permissive use were allowed.

See: *Pritchard v. Norton*, 106 U. S. 124, 27 L. Ed. 104.

Also see note in 78 A. L. R. 883 at 889-90.

C. Under Nebraska law the burden of proving extension of coverage to a person not named in the policy was upon appellee.

Nebraska Statutes for 1943, Vol. 3, Section 44-378 provides as follows:

“Where the description of the insured in the policy is so general that it may comprehend any person or class of persons, he only can claim the benefit of the policy who can show that it was intended to include him.”

The insurance contract limits coverage to a permittee of the *named* insured. (Tr., p. 33.) This is in accord with the general rule and with the case law of Nebraska.

Cronan v. Travelers Ind., 18 Atl. (2d) 13;
Locke v. General Accident, 279 N. W. 55 at 58;
Col. Cas. Co. v. Lyle, 81 Fed. (2d) 281;
U.S.F.&G. v. Mann, 73 Fed. (2d) 465;
Trotter v. Union Ind., 35 Fed. (2d) 109 (9th Cir.);
Fox v. Crawford, 80 N. E. (2d) 189;
Frederiksen v. Employers, 26 Fed. (2d) 76 (9th Cir.);
Wigington v. Ocean Acc., 120 Neb. 162, 231 N. W. 770.

- D. The appellee as a third party claimant must stand in the shoes of Claggett, and if there was no coverage on him, appellee cannot recover.

In *Western Machinery Company v. Bankers Ind. Co.*, 10 Cal. (2d) 488, the California Supreme Court said:

“It is the Hynding case, therefore, which is pertinent and controlling on the question here whether the parties’ agreement as to the permissive uses is binding on the injured person. In the absence of any law declaring the obligation of the insurer in that respect, the conclusion is compelling that the injured person is bound by the limitations contained in the policy.”

To the same effect:

Hynding v. Home Ins. Co., 214 Cal. 743 at 748;

Metropolitan Cas. Ins. Co. v. Colthurst (C.C.A. 9th), 36 Fed. (2d) 559;

Valladao v. Fireman's Fund, 13 Cal. (2d) 322 at 328.

As was said in *Sears v. Illinois Ind. Co.*, 121 Cal. App. 211 at 222:

“In other words, to put it in plain language, if the so-called insured is not in fact insured by the policy as in this case, at the very time the accident occurred the injured person cannot recover against the insurance carrier.”

This Court has followed the general rule in *Home Indemnity Co. v. Standard Accident Ins. Co.*, 167 Fed. (2d) 919 (9th Cir.), where it quotes from *Royal Indemnity Co. v. Watson*, 61 Fed. (2d) 616:

“The contract of insurance was issued for the protection of assured against loss, it was not designed for the protection of strangers. An injured person needs no protection against an assured who is solvent.

“Quite apart from considerations of sympathy or good morals, however, it is well settled in the law that in an action of this character the injured person stands in no better position than the insured * * *.”

In Nebraska we have the case of *General Casualty v. Kierstad*, 67 Fed. (2d) 523 at 525, stating the rule:

“The right of the injured party to proceed against the insurer is dependent upon the provi-

sions of the insurance contract. He can acquire no greater right thereunder than that existing in favor of the insured."

See also:

Card v. Minn., 298 N.W. 157 (Neb.);

Pickens v. Maryland Cas. Co., 2 N. W. (2d) 593 (Neb.).

- E. The reasons for limiting coverage under omnibus clauses to persons given permission by the named insured, and for requiring adherence to declarations about principal place of use and garaging of the vehicle are not the subject of debate and cannot be subjected to critical analysis. The parties may contract on their own terms and third parties cannot chip away the terms of the agreement.

This Court in *Home Ind. Co. v. Standard Accident Ins. Co.*, 167 Fed. (2d) 919 (9th Cir.), quoted the United States Supreme Court decision of *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. Ed. 231 as follows:

" 'It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The Courts may not make a contract for the parties.' "

The Nebraska Supreme Court has also stated this rule in *Johnson v. Caledonian Ins. Co.*, 251 N. W. 821 at 823:

" * * * the appellee (insurance company) had the right to make any reasonable condition as to what risk it might assume in the contract."

The California Supreme Court also recognizes the rule by stating in *National Auto Ins. Co. v. Indus. Acc. Com.*, 11 Cal. (2d) 689 at 691:

“The fact that the assured’s liability to employees of the copartnership was no greater than that which would have attached to him had he retained the status of ‘individual employer’ contemplated by the policy, is of no moment in our determination of the coverage thereunder.”

* * * * *

“The right of an insurer to limit its contract of coverage may not be questioned. (*Zurich Gen. Acc. Ins. Co. v. Stadelman*, 208 Cal. 151 (280 Pac. 687); *Ocean Acc. etc. Co. v. Industrial Acc. Com.*, 208 Cal. 157 (280 Pac. 690).)”

See also:

Boyer v. U.S.F.&G., 206 Cal. 273.

II.

SINCE THE INSURANCE POLICY DID NOT NAME THE JUDGMENT DEBTOR, CLAGGETT, THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH PERMISSIVE USE IN CLAGGETT SO AS TO EXTEND COVERAGE TO HIM UNDER THE OMNIBUS CLAUSE OF THE POLICY.

No evidence was offered by appellee in the trial Court to establish permission from the named insured to Claggett. The complaint alleged that one of Claggett’s attorneys in the State Court action had filed an answer, verified by said attorney, admitting permissive use in Claggett. (Tr., p. 8.) The answer of appellant in the case at bar admitted the filing of such

an answer in the State Court but qualified this by alleging that leave of Court had been obtained in the State Court to withdraw said admission and to file an amended answer denying permissive use from the named insured. (Tr., pp. 19-20.) Counsel for appellee sought to read the admission to the jury without including the qualifying allegations. This bit of chicanery was not allowed by the trial Court. (Tr., pp. 79-81.)

It was and is admitted that the vehicle was owned by Wilbur Mehlin, the named insured. It is also conceded that Mrs. Mehlin gave permission to Claggett to use the car.

The evidence was uncontradicted that neither Mrs. Mehlin nor Claggett had permission from the named insured to use the vehicle. (Tr., pp. 129, 131-132, 144.) In fact, the evidence showed the use of the car by either Claggett or Mrs. Mehlin at the time and place of the accident was contrary to the wishes and without the knowledge of the named insured. (Tr., 129-130, 144, 150.) In fact, he had expressly prohibited its being loaned by his wife to any other person. (Tr., p. 150.) Indeed, the state of the evidence on permissive use was such that the trial judge felt constrained to say in his memorandum opinion:

“It is my opinion, as I stated when the above-mentioned motion and the motion for a directed verdict were argued, that the evidence failed to support a finding that the insured named in the policy expressly or impliedly permitted the use of the automobile covered by the policy by the person

driving it at the time of the accident. Therefore the only question to be resolved by me is whether or not under the applicable law the plaintiff may raise such an estoppel against the defendant, and whether there is evidence to support a finding of such estoppel by the jury.”

This conclusion that permissive use was not established is definitely sustained by the authorities.

In Nebraska the husband is unrestricted in the enjoyment of all the incidents of ownership of personalty.

Sides Estate, 119 Neb. 314, 228 N. W. 619.

Nebraska Statutes of 1947, Sec. 42-601 provides that “all property of the husband, both real and personal owned or claimed by him before marriage or before Sept. 7, 1947, whichever is later, * * * shall be his separate property.”

Nebraska Statutes of 1947, Sec. 42-604 provides that unless in the wife’s name, the husband shall have management and control over community property.

We have already pointed out that the policy itself limits the right of extending coverage under the omnibus clause to the *named* insured. This is a recognized limitation and is a regularly enforced restriction. As said in Nebraska Statutes, 1943, Vol. 3, Sec. 44-378:

“Where the description of the insured in the policy is so general that it may comprehend any person or class of persons, he only can claim the benefit of the policy who can show that it was intended to include him.”

In Nebraska, *Wigington v. Ocean Accident*, 120 Neb. 162, 231 N. W. 770 denied the coverage where the wife of a named insured allowed another to drive the car.

It was held in *Locke v. Gen. Acc.*, 279 N. W. 55 at 58:

“A driver to whom the car has been entrusted by one who had permission to use directly from the named insured, is not an additional assured under the omnibus coverage clause.”

See also:

Col. Cas. Co. v. Lyle, 81 Fed. (2d) 281;

U. S. F. & G. v. Mann, 73 Fed. (2d) 465;

Trotter v. Union Ind., 35 Fed. (2d) 109 (9th Cir.);

Fox v. Crawford, 80 N. E. (2d) 189;

Fredericksen v. Employers, 26 Fed. (2d) 76 (9th Cir.).

Statements in an abandoned or superseded pleading cannot be used as evidence of the fact of permission.

Kambourian v. Gray, 81 Cal. App. (2d) 783;

Gajanich v. Gregory, 116 Cal. App. 622;

Weissbaum v. Eibeshutz, 211 Cal. 170.

Lack of permission in *Claggett* from the named insured was established as a matter of law and there were no inferences to assist the appellee.

Engstrom v. Auburn, 11 Cal. (2d) 64;

Kimbles v. Kelly, 6 Cal. App. (2d) 91;

Montanya v. Brown, 31 Cal. App. (2d) 642 at 645.

It is also the rule in Nebraska that any inference or presumption of permission vanishes in face of positive evidence.

Myers v. McMaken, 276 N. W. 167 (Neb.);

Harrell v. Peoples City Mission, 267 N. W. 344
(citing the California case of *Hanchett v. Wiseley*, 107 Cal. App. 230);

Philleo v. Hefnider, 2 N. W. (2d) 31 (Neb.);

Witthauer v. Paxton-Mitchell Co., et al., 19
N. W. (2d) 865.

In the latter two cases there was a nonsuit and a reversal, respectively.

Appellee, having failed to prove permissive use, sought to establish it by reliance upon principles of waiver and estoppel.

III.

**THE EVIDENCE WAS INSUFFICIENT, AS A MATTER OF LAW,
TO ESTABLISH EITHER WAIVER OR AN ESTOPPEL WITH
RESPECT TO PERMISSIVE USE.**

The burden of proof of estoppel and all its elements is on the party pleading it.

State v. Cheyenne Co., 241 N. W. 747, 123
Neb. 1.

In *Chester Pyle Co. v. Fossler*, 200 Cal. 204 at 210, the Court said:

“Waiver always rests upon intent and knowledge.”

Similarly *Aronson v. Frankfort*, 9 Cal. App. 473 at 480, holds:

“A waiver in law is the intentional relinquishment of a known right; and the burden is upon the party claiming such waiver to prove it by such evidence as does not leave the matter doubtful or uncertain.”

The evidence relied upon by appellee to show waiver and estoppel fails to show *knowledge* on the part of appellant of the facts which would have warranted its declining coverage. (See a resumé of the evidence relied upon in the appendix pages i to vi.) The appellant offered evidence that showed lack of knowledge at the time it was negotiating with appellee. (See appendix, pp. vi to xv.) Appellant also proved that it obtained a reservation of rights agreement from Claggett and from both Mehlin, the former before trial in the State Court (Tr., pp. 231-235; 250-251) and that it advised counsel for appellee of the policy defenses before trial. (Tr., pp. 223, 227, 228-229.)

The elements of waiver and estoppel that must be proved are well established.

In *McDanel v. General Ins. Co.*, 1 Cal. App. (2d) 454 at 460, the rule on waiver is stated:

“To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege—an election to dispense with something of value or to forego

some advantage which one might, at his option, have demanded or insisted upon. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to."

The rule is clearly stated in *Mirich v. Underwriters at Lloyds*, 64 Cal. App. (2d) 522 at 530:

"One of the essential elements of estoppel and waiver is knowledge of the facts. There can be no waiver of the right to charge fraud, misrepresentation, or breach of warranty except by acts and conduct subsequent to the discovery of the facts, and by conduct evidencing an actual intention to relinquish a right. (*McDanel v. General Ins. Co.* (1934), 1 Cal. App. 2d 454 (35 P. 2d 394, 36 P. 2d 829); *California-West. States etc. Co. v. Feinsten* (1940), 15 Cal. 2d 413 (101 P. 2d 696, 131 A.L.R. 608).)"

In the foregoing case the insurance company defended the action to a conclusion, although it learned of the insured's fraud during the trial. The Court pointed out:

"The company undertook the defense of the suit because it was required to do so under its policy, and it was placed in that position through the misrepresentation of Dr. Balsinger. He could not justly complain because the company's attorney protected his rights until the trial was finished."

* * * * *

“Plaintiff’s right to recover on the policy can be no better than that of Dr. Balsinger, and the claim of waiver or estoppel asserted by her has no validity. (*Kindred v. Pacific Auto. Ins. Co.* (1938), 10 Cal. 2d 463, 466 (75 P. 2d 69), and cases there cited.)” (Page 531.)

See also:

Cohen v. Metropolitan Insurance Co., 32 Cal. App. (2d) 337 at 348.

Nebraska has followed the same rule. In *George v. Guarantee Mut. Life Co.*, 13 N. W. (2d) 176 (Nebraska Supreme Court) where an agent of the company had some knowledge that assured had been under treatment the Court said:

“ ‘Waiver’ is an intentional relinquishment or abandonment of a known and existing right, benefit or advantage, and there can be no waiver unless the party against whom it is invoked was in possession of material facts and acted with intent to waive * * *.”

See also:

Klanecky v. Woodmen, 254 N. W. 577, 126 Neb. 809;

Sawyer v. Sovereign Camp, 181 N. W. 191, 105 Neb. 395;

Nash v. Baker, 58 N. W. 706, 40 Neb. 294;

Hamilton v. Home Ins., 61 N. W. 93, 42 Neb. 883;

Williams v. Neely, 134 Fed. 1.

Keeping in mind that waiver and estoppel must be predicated upon proof of knowledge by the party to

be estopped or the party who is claimed to have waived his rights, there is no evidence of any knowledge by anyone until April, 1948. Even at this time the knowledge was inconclusive and incomplete. The facts were not definitely established until August, 1948, when sworn statements were taken from Mr. and Mrs. Mehlin. By that time a judgment had already been rendered against Claggett for \$30,000.

At the time the insurance company was negotiating with plaintiffs' attorney and at the time Claggett's answer was filed the uncontradicted evidence shows that neither the insurance company nor its attorneys had any notice or knowledge that Claggett was driving the vehicle without the permission of Wilbur Mehlin. Nor was there any evidence to justify a conclusion that the assumption of permissive use was not wholly warranted under the facts obtained from Claggett and Mrs. Mehlin.

Another element of estoppel or waiver is lacking. The evidence was insufficient as a matter of law to show any change of position by plaintiff or reliance to her detriment upon any conduct of the insurer's representatives. The evidence on this subject matter is summarized at pages i to xv in the appendix.

The general rule is set forth in 29 Am. Jur. "Insurance" paragraph 855:

"Where knowledge is acquired after loss, the rights of the parties are substantially fixed, and the insured cannot be prejudiced by the silence or nonaction of the company in respect of a breach of the policy which occurred before loss."

In California the case of *McDanel v. General Ins. Co.*, 1 Cal. App. (2d) 454 involved a claim of waiver and estoppel based upon the insurer's proceeding with the trial after learning of the assured's breach. The Court held there was no estoppel and said:

"No advantage over appellant was gained for the insurer by proceeding with the trial, nor did appellant suffer any disadvantage therefrom. No change of position by appellant was caused thereby, nor did the rights of any other person intervene because thereof. Despite the fact that respondents continued to participate in the trial in the absence of the assured, who was a material witness, appellant secured a judgment for an amount double the liability of respondents as stated in the insurance policy. Surely neither disadvantage to appellant nor advantage to respondents is reflected by such result."

* * * * *

"Here appellant lost no advantage which he had a right to claim. He was not entitled to any right to try his action for damages without opposition nor as a default case. The contract of insurance obligated the respondents to defend the suit in the name and on behalf of the assured. This duty respondents undertook to discharge when suit was brought against the assured, and continued to perform without definite knowledge of breach or intended breach until about one month before the actual trial, when they gave the notice of breach and nonwaiver to the assured as above recited." (Pages 460-461.)

In our case the appellee's attorneys opposed a continuance of the trial in the State Court, even after

learning of the policy defenses being raised by appellant's counsel at that time. (Tr., pp. 223, 225, 227.) Both counsel were on equal footing at that time as far as learning the facts about permissive use. There was still time for service of summons on Mr. and Mrs. Mehlin as nonresidents under Section 404, California Vehicle Code. (Appendix, p. xv.) In fact appellee was successful at the trial at Martinez in securing a judgment against Claggett for \$30,000. There was no evidence of Claggett's insolvency or lack of ability to pay. There was no evidence that any different facts on permissive use could have been developed by appellee. There was no evidence that a settlement could have been obtained for a figure satisfactory to both parties—if *all the facts had been known by both parties*. The burden of proof of waiver and estoppel being on appellee, these omissions in the proof were fatal to appellee's claim.

In Nebraska the rule is that the claimant must show that he acted to his *detriment* or that he altered his position in some material respect.

Oak Creek Bank v. Helmer, 80 N. W. 891 (Neb.);

National Aid v. Brachter, 91 N. W. 379 (Neb.), 93 N. W. 1122;

Haschenberger v. Dennis, 225 N. W. 25 (Neb.).

It has been pointed out that the rights of the parties under the policy became fixed at the time the accident happened. As was said in *Commercial Standard v. Robertson*, 159 Fed. (2d) 405 at 408:

“The basis of an estoppel resting upon waiver is reliance by one upon the act or representation of another, and subsequent loss or detriment because of such reliance. The rights of the parties here were fixed at the time of the accident, and nothing that occurred afterwards affected them.”

Royal Ind. v. Watson, 61 Fed. (2d) 616, indicates quite correctly:

“The contract of insurance was issued for the protection of the assured against loss, it was not designed for the protection of strangers. An injured person needs no protection against an assured who is solvent.”

The leading case in Nebraska is *Wigington v. Ocean Accident*, 231 N. W. 770, where it was held under facts very similar to the ones at bar:

“As to the insurance company’s interference by furnishing an attorney in behalf of Crawford (Claggett in our case), he not having been an ‘insured’, (having permission from the wife and not from the named insured), such interference could not give rise to an estoppel as herein contended.”

It is difficult to see how strangers to the contract can claim that coverage has been extended to another stranger to the contract on the basis of alleged negotiations by the insurer *after the facts* have already been established and *after* the loss has already occurred.

As has been indicated by language quoted from the decisions, no detriment can come to one who never had any rights under the contract as of the time of loss. No right exists in strangers to the contract to have their claims paid without contest. The existence of an insurance policy is a windfall. If the claimant is successful in obtaining a \$30,000 judgment against the man sued, he could not ask for more—and cannot claim detriment therefrom. Before trial appellee's attorney was told of the probable lack of coverage and was told that a nonwaiver agreement had been secured. Despite this information, he elected to insist upon an immediate trial without further effort to investigate the facts or to resume negotiations for settlement with the company. By then the company had learned enough about lack of coverage to be on a wiser footing in settlement discussions than it had been previously in negotiating when its attorneys were not yet in the case.

It is obvious that there was no proof of detriment to appellee as a result of any negotiations or trial in the State Court.

The insurer is under no obligation to notify strangers to the contract of the nonwaiver agreement. This is made clear in the Nebraska case of *Wigington v. Ocean Accident*, 231 N. W. 770. Similarly, in *Hodges v. Ocean Acc. & G. Corp.*, 18 S. E. (2d) 28, the insurer defended without telling the injured party of lack of coverage. A directed verdict for the defendant was affirmed. In the case of *Suydam v. Pub-*

lic Ind. Co., 161 Atl. 449 (N.J.), a reservation of rights or nonwaiver agreement was made and the insurer's attorneys defended without advising the injured party of the reservation of rights. In holding against a claim of waiver and estoppel the Court said:

“Since the injured party in this case had no interest in the contract between the insurer and insured until after judgment and the return of execution unsatisfied, he was not entitled to notice of reservation of rights by the insurer or the waiver of those rights by the insured, both of which were matters occurring prior to the accrual of any interest in the policy of the party injured.”

A similar ruling is found in *La Roche v. Farm Bureau Mutual*, 7 Atl. (2d) 361 (Pa.).

In summary, therefore, neither waiver nor estoppel was shown by appellee because conduct relied upon occurred before any knowledge of the lack of permissive use was established. Secondly, conduct immediately preceding and during trial was known by appellee to be under a nonwaiver agreement. Thirdly, the evidence failed to establish a change of position to the detriment of appellee.

Moreover, since appellee must stand in the shoes of the insured and is bound by the terms of the insurance contract, there is another fatal obstacle to the claim of waiver and estoppel.

IV.

THE PROVISIONS OF THE POLICY AGAINST WAIVER AND ESTOPPEL EXCEPT IN WRITING AND EXCEPT BY DULY AUTHORIZED OFFICERS ARE VALID PROVISIONS AND ARE RECOGNIZED AS SUCH BY THE CASES.

Analysis of appellee's claims about waiver and estoppel indicates that she relied upon certain acts of an adjuster in his investigation of the accident, upon certain conversations between an assistant claims manager and the attorney for the plaintiff concerning settlement, upon the alleged verbal statements of an adjuster sent to get an extension of time to the effect that the problem of permissive use was not involved and that the company was satisfied on that subject, and upon an admission in a pleading in another action where the issue was not raised nor involved and the admission was withdrawn. None of these things satisfy the requirements. The authority to make a contract of insurance on behalf of the company was not shown in any of these people. The conduct relied upon falls short of establishing a change in the policy provisions in the manner required, even assuming the authority existed.

The policy required that the company defend claims against the insured, even though groundless. (Tr. p. 32.) The action in the State Court was against Mehlin as well as against Claggett. The contract permitted the company to negotiate for settlement of such claims as well as requiring it to defend them. In connection with these matters the policy stated:

“Acts of the Company or its representatives in performing the duties or exercising the rights under this agreement shall not operate to waive the Company’s rights nor estop it from asserting any defense under the policy.”

In addition to the foregoing the policy conditions contained the following:

“8. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy signed by an executive officer of the Company.”

There were no endorsements issued and no executive officer was shown to have waived or changed any of the pertinent policy terms in this respect.

In California such policy restrictions are recognized and are given effect.

Gladding v. C.F.M.F., 66 Cal. 6 at 8;

Hargett v. Gulf Ins. Co., 12 Cal. App. (2d) 449 at 454.

In discussing the subject of waiver and estoppel care must be taken to distinguish cases which deal with a breach of condition or warranty resulting in a forfeiture. Our case, on the omnibus coverage question, does not come in that category. No question of

forfeiture for breach of condition is involved. We have a valid insurance contract at all times. The question to be discussed later concerning place of use and garaging of the car is a different problem.

As long as the distinction between forfeiture cases and coverage cases is kept in mind, it can be determined quite readily that Nebraska follows California in holding that nonwaiver provisions and limitations in a policy are valid and to be given effect.

German Ins. Co. v. Heidink, 46 N. W. 481 at 483, 30 Neb. 288;

McElroy v. Metropolitan Life, 122 N. W. 27.

(In this case a directed verdict is involved);

Jensen v. New York Life, 59 Fed. (2d) 957 (Neb.);

Card v. Minn., 298 N. W. 157;

Pickens v. Maryland Cas., 2 N. W. (2d) 593.

(This involves the violation of the place of use provision.)

In the Nebraska case of *Fidelity Mutual Fire v. Lowe*, 93 N. W. 749 at 752, the Court says:

“Nothing herein is intended to qualify or modify the doctrine established in this Court that, where a policy provides that no waiver of any of its conditions will be valid until ‘the same be indorsed in writing on the policy and signed by the president or secretary at the home office only’, as provided in the policy under consideration, it will not be permitted to a party to show waiver by any other or different modes.”

See also the leading case of *Northern Assurance Co. v. Grand View*, 183 U. S. 108, 46 L. Ed. 213 at 235. This case came up from Nebraska and recognizes restrictions against policy changes by means of unauthorized parol agreements.

See also:

American Fire v. Landfare, 76 N. W. 1068 at 1070 (Neb.).

The persons dealing with appellee in the case at hand were *claims* men—not underwriting or coverage men. None was an executive officer. No written endorsement was issued which purported to change any condition let alone waive any. Proof of permission was at no time dispensed with by any writing or by any executive officer. Such requirements are standard in policies of this kind, and no one can rely on mere settlement negotiations or appearances for a person sued to work a change in the insurance contract or to supply an absent fact.

Completely determinative of the principal issue in this case (i.e. lack of permissive use) and clearly illustrative of the distinction between forfeiture and nonforfeiture cases is the following line of authorities.

V.

INSURANCE COVERAGE CANNOT BE EXTENDED BY MEANS OF WAIVER OR ESTOPPEL. A FAILURE OF PROOF TO BRING SOMEONE WITHIN THE COVERAGE PROVISIONS OF THE POLICY LIKEWISE CANNOT BE SUPPLIED BY WAIVER OR ESTOPPEL.

It must be conceded in this case that permission was not given by the named insured and a failure of proof in this regard existed unless by waiver or estoppel it could be supplied. The fact of permission cannot be created by acts or conduct after the happening of the accident. The facts have occurred and cannot be changed by what is done or not done, once the rights of the parties became fixed at the time of the accident.

The appellee attempted to extend the coverage of the policy to someone not designated in the policy as being covered. They could not do this by means of proof of waiver or estoppel.

In *Conner v. Union Automobile Ins. Co.*, 122 Cal. App. 105 at 110 it is held that a contract of insurance may not be reformed, so as to create a liability for conditions which are excluded by the terms of the instrument, by means of the doctrine of waiver.

In *John Hancock etc. Ins. Co. v. Markowitz*, 62 Cal. App. (2d) 388 at 397, it is held that the doctrine of waiver cannot be used to the extent of broadening the coverage so as to make a policy cover a risk not within its terms.

In 45 *C. J. S.* 617, note 39, it is said:

“The doctrine of waiver or estoppel cannot be successfully invoked to create a primary liability,

or a liability for a benefit not contracted for at all, *or to supply a failure of proof that a loss was covered by the policy.*" (Emphasis ours.)

It would seem that Nebraska recognizes this rule by the decision in *Card v. Minn.*, 298 N.W. 157, where the evidence showed that the insurance agent had knowledge of a sale and mortgage on the property, but the policy was issued only in the name of the seller—mortgagee. It was held that a stranger to the contract, namely the buyer or mortgagor, could not claim that the coverage was extended to include his interests by virtue of the doctrine of waiver or estoppel.

Heime v. Glens Falls Ins. Co., 222 N.W. 731 (Mich.) holds that an estoppel cannot be used to assert that a policy issued on a GMC truck should include a Union truck.

In *Macomber v. Minn. F. & M.*, 204 N.W. 331, it is held that estoppel cannot extend coverage to the husband when the property was in the wife's name and the insurance contract was not with the husband. The Court said:

"But the difficulty of applying the doctrine of estoppel in this case arises from the fact that the plaintiff never had any contractual relations with the defendant companies, and the doctrine of estoppel will not apply to create a contract that never existed."

A good analysis of the distinctions is to be found in *Washington Nat. Ins. Co. v. Craddock*, 109 S.W. (2d) 165 (Texas). The policy in that case was an

accident policy for accidental injury. It excepted, however, injury from gunshot wounds. The complaint alleged that the insurance company knew that the injury for which he made claim was a gunshot wound and the agent who knew it furnished him with the blanks to fill out, which he mailed to the company, stating the nature of his accident. The company paid him for eleven weeks and then declined to make any further payments. It was claimed that the company waived the condition excepting gunshot wounds by making the payments for eleven weeks and was estopped from denying its liability. A demurrer was sustained and this was affirmed on appeal. The Court said:

“The question presented is not whether the act of the Insurance Company in making payments would constitute a waiver of its right to forfeit the policy on account of some breach by the insured of its terms, but is whether a contractual liability may be created by a waiver. By its policy the Insurance Company did not assume any liability for the risk declared upon and no consideration moved to it after the accident for the assumption of such liability. The insured seeks to create that liability by invoking the doctrine of waiver. That doctrine cannot be made to serve that purpose.”

The Court also quotes with approval from 32 *C. J.* 1317 as follows:

“A waiver cannot operate to bring within the terms of the policy a loss which is expressly excepted therefrom or supply a failure of proof that a loss was covered by the policy.”

In *Rosenberg v. General Accident*, 246 S.W. 1009 (Wis.) the adjuster was shown to have known that the goods involved in the loss were in the east half of a building and not in a portion covered by the policy. It was claimed that conduct after the loss with such knowledge amounted to a waiver and the Court said:

“* * * failure to prove a loss covered by the policy could not be supplied in this manner.”

In *Pierce v. H. Life Assn.*, 272 N.W. 543, a directed verdict was affirmed where the Court said that waiver and estoppel could not supply a failure of proof that the loss came within the terms of the policy. There it was necessary to prove that the death occurred prior to the age of sixty.

In *Carnes & Co. v. Employers*, 101 Fed. (2d) 739, the policy covered farm machinery, Crane fixtures and paints. The hauling of butane gas was not covered. The evidence showed that an agent of the insurance company knew when the policy was renewed that the insured was hauling butane gas. In stating the points involved the Court said:

“Appellants seek to bind the insurance company by the doctrine of waiver and estoppel. * * * They point out waiver and estoppel and appellants would have them * * * (referring to cases) apply where coverage is sought to be extended to the hauling of butane gas, a thing the policy did not originally cover. This cannot be done.

“It is well settled that conditions going to the coverage or scope of a policy of insurance, as distinguished from those of furnishing a ground

for forfeiture, may not be waived by implication from conduct or action. The rule is that while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage or restrictions on coverage cannot be extended by the doctrine of waiver or estoppel."

In *Van Meter v. Franklin Fire*, 164 Fed. (2d) 325 at 326-327 (9th Cir.), the insurance covered property only while in the State of Washington. It was removed to Oregon and it was claimed that the company was bound by waiver and estoppel through knowledge of the company concerning the change of location. In stating the case the Court said:

"The claim was presented in the trial court that the provision in the instant case is a condition rather than a coverage restriction and hence within the doctrine of waiver or estoppel. The policy in providing that the equipment is covered only while in the State of Washington constitutes a coverage restriction in that it covers property only within a given area, and the trial court was correct in so ruling."

Judgment of dismissal was affirmed.

In *Commercial Standard v. Robertson*, 159 Fed. (2d) 405, at 408, the policy required as a restriction for coverage that a certificate from the Interstate Commerce Commission be obtained by the operator of the vehicle. In stating the case the Court said:

"The insurer did not learn that no certificate had issued until after the accident. The basis of an estoppel resting upon waiver is reliance by one

upon the act or representation of another, and subsequent loss or detriment because of such reliance. The rights of the parties here were fixed at the time of the accident, and nothing that occurred afterwards affected them.”

In *F. & G. Fire Corp. v. Bilquist*, 99 Fed. (2d) 333 at 335 (9th Cir.) the coverage was on property while occupied only for dwelling house purposes. This was held to be a restriction on coverage and not a condition and not the subject of waiver or estoppel.

In *Antone v. New Amsterdam*, 6 Atl. (2d) 566 (Pa.), a policy was issued on an Austin car in the name of Wayne Watterson. Another policy was issued on a Dodge in the name of C. H. Watterson. Wayne died and C. H. Watterson used the Austin and an employee of his had an accident. As a result of this accident a suit was filed against Watterson and he tendered the defense to the insurance company. The company undertook the defense until it learned of the facts and then it withdrew the defense for Watterson. Judgment was obtained against Watterson and a suit was brought against the company on the judgment obtained. The Court held as follows:

“The question is whether the Courts will apply the principle of estoppel to an insurance company which never had an indemnity contract with a defendant * * * upon which therefore no liability ever rested, so that it cannot challenge the total failure of any contractual relationship between it and another party, basing the application of estoppel upon the facts that the company took over the investigation of the case in connec-

tion with the personal injury sustained and conducted the preliminary proceedings prior to the trial of the cause.

At the time of the accident * * * C. H. Watter-son had acquired no rights under the policy covering this Austin touring car. He was then a total stranger to the insurance policy herein invoked. There was not the slightest liability ligament existing between the insurer of Wayne Watterson and the defendant in the action of tort. The cases in Pennsylvania and elsewhere that recognize the estoppel theory in insurance contract cases are all cases where some contractual relationship existed between the parties. Before a court can say that a company is estopped to deny that 'it waived the condition of the policy', there must be a covering policy. But where there is no policy, there is no condition to be waived. By undertaking the defense an insurer elects to treat the insured's cause of action, if he had any, *as covered by the contract*.

Here the doctrine of estoppel is being used, not to make a contract operative, but to create a contract where none existed."

* * * * *

"What is insisted upon is not really the waiver of a forfeiture, or an equitable estoppel insisting upon a condition of the policy, the violation of which would otherwise work a forfeiture * * *. What is here sought is not to prevent a forfeiture, but to make a new contract. * * * We do not understand that the doctrine of estoppel or waiver goes that far. After a loss accrues, an insurance company may, by its conduct, waive a forfeiture; or by some act before such loss it may induce the

insured to do or not to do some act contrary to the stipulations of the policy, and thereby be estopped from setting up such violation as a forfeiture; but such conduct, though in conflict with the terms of the contract of insurance and with the knowledge of the insured, and relied upon by him, will not have the effect to broaden out such contract so as to cover additional objects of insurance or causes of loss."

The Court goes on to say that the third party, Antone, cannot invoke estoppel because he is a "stranger".

"In this proceeding Antone's rights against the insurer can rise no higher than C. H. Watter-son's."

In *Demy v. Royal Indemnity*, 159 N. E. 107 at 109, a policy was issued on a Cadillac agency when cars were used in the business. It also extended to employees. The driver took one of the cars on a trip of his own, not for the company. In the action brought against the company and the employee, the insurance company defended both. The Court held there was no estoppel and said:

"The terms of the policy cannot be enlarged or diminished by judicial construction."

In *Home Indemnity Company v. Standard Accident Insurance Company*, 167 Fed. (2d) 919 (9th Cir.) the rule is clearly stated by this Court as follows:

"In such a situation, when a party seeks to read something into the contract of insurance that

is not there, a court must perforce say, with Shylock,

‘Is it so nominated in the bond? * * * I cannot find it; ’tis not in the bond.’

This is the teaching of the cases in California and elsewhere. In *Carabelli v. Mountain States Life Ins. Co.*, 8 Cal. App. (2d) 115, 46 Pac. (2d) 1004, 1006, hearing denied by the Supreme Court of that State, the Court said: ‘The general rule is that an insured must bring himself within the express terms of the policy before he is entitled to recover thereon, and where these terms are plain and explicit, the courts cannot create a new contract for the parties by a forced construction of such plain and explicit terms’.”

In *Kabinski v. Employers Liab.*, 8 Atl. (2d) 605 (N. J.), it was held company did not enlarge the scope of its undertaking by continuing with the defense of the action after the driver failed to appear at the trial.

It seems clear that we are dealing with a question of how a limited coverage may be extended to persons not described by name in the policy. The question of a breach of condition or a forfeiture is not involved. Hence, what is being attempted is the supplying of evidence to fill a gap in the proof. This is not the proper function of waiver or estoppel. 45 *C.J.S.* 617, seems to nail the idea to the mast quite succinctly and irrefutably:

“The doctrine of waiver or estoppel cannot be successfully invoked to create a primary liability,

or a liability for a benefit not contracted for at all, *or to supply a failure of proof that a loss was covered by the policy*” (Emphasis ours.)

VI.

THE DECLARATION CONCERNING THE PRINCIPAL PLACE OF USE AND GARAGING OF THE VEHICLE WAS BREACHED WHEN THE WIFE BROUGHT THE VEHICLE TO CALIFORNIA WITH THE INTENTION OF REMAINING HERE.

The insurance policy in the schedule of declarations which form a part of the consideration for the issuance of the policy and the application state that the principal place of use and garaging of the vehicle will be in Lincoln, Nebraska.

In the case of *Purcell v. Pacific Auto.*, 19 Cal. App. (2d) 230, the declaration stated that the vehicle would be principally garaged and used in Bakersfield. Instead it was taken to Los Angeles and eight hours after the effective time of the policy the accident occurred. It was shown that the intention of the insured was to use the vehicle in Los Angeles and not in Bakersfield. It was held that this was a breach and avoided the policy.

See also *Kindred v. Pacific Auto.*, 10 Cal. (2d) 463. This case held the breach vital regardless of how the provision was construed.

A change in location and use from Nebraska to California is a material change and involves a greater exposure to traffic hazards, particularly where

the named insured with whom the insurance company is dealing has no power to control the selection of persons to drive the vehicle, nor the areas in which it is to be used. Such a change in location involves a material breach warranting the avoidance of coverage.

C.I.T. v. American Central Insurance Company, 18 Cal. App. (2d) 673.

The declaration in the insurance contract is a promissory warranty and does not need to be labeled as such to make it a warranty. The policy states that it is issued in consideration of the premium and the statements contained in the declarations. The declaration states unequivocally that the automobile "will be principally garaged and used in the above town, county and state." This statement is in nowise modified by the general restriction under conditions that the policy applies only to accidents which occur while the automobile is within the United States, its territories or possessions, Canada or Newfoundland. This very broad term is clarified by the following, "and used for the purposes stated as applicable thereto in the declarations." Such a broad territorial coverage is quite different from the question of principal garaging and using of the vehicle.

In our case the wife intended to stay in California and this question of intention was made important in the *C.I.T.* case, *supra*.

In California the Insurance Code on the subject of warranties, states, Section 442:

"A particular form of words is not necessary to create a warranty."

Section 444 of the Insurance Code says:

“A warranty may relate to the past, the present, the future, or to any or all of these.”

Section 445 of the Insurance Code states:

“A statement in the policy, which imports that there is an intention to do or not to do a thing which materially affects the risk, is a warranty that such act or omission will take place.”

It goes without saying that the operation of a vehicle on the highway of California, around the metropolitan area of San Francisco, materially increases the risk of accident over the risk that would be involved in the operation of such a vehicle in the State of Nebraska. It is also a material increase of the risk to have the vehicle in the possession of a fugitive who has stolen a car, and a further added increase to have it continuously in the possession of the wife who has been consorting with other men and has indicated by her actions an irresponsible conduct.

The declaration concerning the principal place of garaging and use has been held to be a promissory warranty as indicated in *Appleman, on Insurance*, Vol. 4, page 528, where he says:

“* * * but the majority of courts have held it to be a promissory warranty or continuing condition of the insurance, which would be avoided by permanent change in location without notice * * *.” (Citing *Marone v. Hartford*, 176 A. 320, *Lummus v. Fireman's Fund*, 83 S. W. 688, *North River Ins. Co. v. Lewis*, 119 S. E. 43.)

In the Federal District Court for Los Angeles we have the case of *Connecticut Indemnity Co. v. Howe*, 41 Fed. Supp. 222. In that case there was the similar policy declaration that the automobile would be principally garaged and used in the above town, county and state, namely Palo Alto. The policy was issued to a bartender who worked at "Dinah's Shack". The accident happened in Los Angeles where the assured had gone about a month before the accident and had taken up residence in one of the suburbs of Los Angeles. He apparently was attempting to establish the business of operating a driving school in Southern California. The investigator asked the assured if it was his intention to continue to live in Los Angeles and he answered, "I can't say about that." The District Court of the United States in Los Angeles held that this was a breach of the policy and that there was no liability on the insurer for the accident.

In Nebraska the rule is stated in *Sanks v. St. Paul*, 267 N. W. 454 at 458:

"An act of the insured that constitutes a clear breach of a promissory warranty in an insurance contract and which contributes to the loss will prevent a recovery for such loss."

No completely analogous case has been found in Nebraska on this point, but one that closely parallels it is *Johnson v. Caledonian Ins. Co.*, 251 N. W. 821 (Neb.). The policy covered a horse while in a certain pasture. A removal permit could be obtained if it was desired to move the horse. The horse was moved once under such a permit. At the time in question,

however, the horse had been placed in a different pasture without the permit and while there it was struck by lightning. In holding that there was no coverage, the Court said:

“the appellee (ins. co.) had the right to make any reasonable condition as to what risk it might assume in the contract. * * * the insurance company by the very terms of the contract had the right to know where the stock was being kept and under the terms thereof was privileged to discontinue the insurance if it was not satisfied with the risk and the continuance of the same in the new location. * * *

It can be said with some degree of certainty that locations differ with respect to lightning hazards because of the nature of the land and soil conditions, the presence of high trees * * *.”

The Court went on to state that the unauthorized removal contributed to the loss.

CONCLUSION.

It is respectfully submitted that the evidence was insufficient as a matter of law to establish that appellant's insurance policy covered Claggett at the time of the accident.

There can be no dispute that Claggett was not operating the car with the permission of the named assured. The proof fell short on that vital point.

Evidence of permission could not be supplied by means of a claim of waiver and estoppel. Waiver

and estoppel cannot be used to extend coverage where none existed before.

Even the evidence on waiver and estoppel failed as a matter of law to establish either doctrine because there was no proof that the defendant, or any of its authorized agents had the requisite knowledge of the facts at the time negotiations were pending. In addition the appellee failed to establish that any different result could have been obtained by investigation or by a default judgment.

The effort to establish waiver and estoppel could not be allowed in view of the restrictions in the policy on those subjects.

A promissory warranty was breached and avoided coverage because of the change of principal place of garaging and use of the vehicle. No doctrine of waiver or estoppel was asserted or established with reference to this defense.

It is respectfully submitted that the judgment entered on the verdict should be reversed with directions to the trial Court to enter judgment in favor of the defendant.

Dated, San Francisco, California,

July 5, 1950.

LEIGHTON M. BLEDSOE,

DANA, BLEDSOE & SMITH,

Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

Section A.

The witness, Augustus Castro, testified on behalf of appellee. (Tr., pp. 81 to 105.) He said that after he was employed as attorney for plaintiff ten days after the accident he wrote a letter to the insurance company suggesting settlement. (Tr., p. 83.) Four days later a reply was received in which the insurance company stated that they had been unable to find any policy issued to Mr. Claggett, the driver of the car. (Tr., p. 84.) About nineteen days later he said that an insurance adjuster named Dennis telephoned to advise that they had located an insurance policy on the automobile involved in the accident. Twenty-eight days later an insurance adjuster named Gripenstraw called upon Mr. Castro. (Tr., p. 85.)

Mr. Castro testified that he had a conversation with Mr. Gripenstraw (this was two months after the accident) in which Mr. Gripenstraw said they had an insurance policy covering this automobile and that they were interested in seeing if the case could be settled. Mr. Castro asked Mr. Gripenstraw, who was a claim adjuster, what the policy limits were and Mr. Gripenstraw told him he was not permitted to give that information. Mr. Castro then said he thought the policy limits should be paid and was advised by Mr. Gripenstraw that the company would not do that because they had a defense to the case. Mr. Castro then asked what possible defense there was, stating

that the only issues involved were negligence and permission to use the automobile and asked Mr. Gripenstraw if there was any question about the permission. Mr. Gripenstraw is supposed to have replied: "No there isn't. We are satisfied that Mrs. Mehlin had the permission to bring the automobile out here and that Mr. Claggett had her permission to use it." (Note that this conversation took place several months before anyone in California knew that Mrs. Mehlin had come to California without the knowledge or permission of her husband and before anyone in California knew that Mrs. Mehlin had been arrested and returned to Nebraska for the unpermitted taking of the automobile.) Mr. Castro went on to testify that Mr. Gripenstraw offered \$7500 in settlement.

A later telephone conversation was described by Mr. Castro in which he called Mr. Gripenstraw and told him \$7500 was not acceptable. Mr. Gripenstraw said the California office had no authority to pay the policy limits and would have to contact their office at Bloomington, and that a board would have to pass on any payment of policy limits. Later Mr. Castro was told that the offer would not be increased over \$7500. (Tr., p. 87.)

The two conversations with Mr. Gripenstraw were January 13, 1948 and January 22, 1948. On January 28, 1948, about three months after the accident, Mr. Hunt of the insurance company called Mr. Castro and stated that before turning over the case to attorneys a last effort for settlement was suggested. A fig-

ure of \$8500 to \$9,000 was mentioned and after Mr. Castro consulted with his client he called Mr. Hunt on February 5th and advised that he would not accept less than \$9,750. The settlement negotiations were terminated and Mr. Castro was advised that the case would be turned over to the insurance company lawyers. (Tr., pp. 88 and 89.)

There were no further communications between Mr. Castro and the insurance company or the attorneys, except that an answer was served and filed about February 17, 1948. (Up to this time no information had been received by anyone in California concerning the true circumstances of the automobile's presence in California.)

At the time the answer was filed in the State Court neither the insurance company nor its attorneys had information concerning Mrs. Mehlin's theft of the automobile, or of her arrest and return to Nebraska. This answer was filed some three and one-half months after the accident had occurred and at least three months after the attorneys had commenced to represent the plaintiff. Mr. Castro testified that no investigation was made after the filing of that answer concerning the permissive use since the answer had admitted permissive use and Mr. Gripenstraw had stated that there was proper permission. Mr. Castro testified that he relied upon the representation of Mr. Gripenstraw and on the admission in the answer, and consequently did not investigate the subject. (Tr., pp. 91 and 92.) (There was no showing that any investi-

gation by anyone could have produced any testimony that would differ from the true situation, namely, that the wife had taken the automobile without permission.)

Mr. Castro testified that neither Mr. Mehlin nor his wife were served with summons and complaint and stated that nothing would be gained by serving them as long as Claggett had permission to use the vehicle. (Tr., p. 92.) This presupposed the existence of an omnibus coverage in the policy. If such coverage did not exist the only liability against Mr. and Mrs. Mehlin would have been the ownership liability with the statutory limits of \$5,000. California Vehicle Code, Section 402.

After the answer was filed Mr. Castro testified that a memorandum to set the case for trial was served February 25, 1948, and a stipulation for trial was entered into to the effect that the case could be tried on July 7, 1948.

No further conversations between counsel occurred until about a week or ten days before the trial date, at which time Mr. Dana asked for a continuance and said he thought it was a case which should be settled and stated that if a consent to a continuance was given he thought he could work out a settlement. The continuance was refused. Another request for a continuance was made a few days before trial with another statement about settlement if it could be continued. Again the continuance was refused. (Tr., p. 93.)

On July 1st or 2nd Mr. Castro testified that Mr. Bledsoe called advising that he was going to move for a continuance and Mr. Castro further testified that on the morning of trial on July 7th a formal motion for a continuance was made and granted upon condition that certain expenses and jury fees be paid by defendant. Mr. Castro then related that he was told by Mr. Bledsoe after the continuance was granted that a question of permissive use was involved and that the company had not secured any reservation of rights up to that time and he did not know what he could do about it because of Claggett's absence. (Tr., p. 94.) (This recitation of evidence omits the uncontradicted fact that Mr. Castro's office was advised on the morning of July 2nd that there was a policy coverage question involving permissive use.)

The testimony of Mr. Castro also reveals that an amended answer was filed by leave of Court on July 7th, changing the admission of permissive use to a denial thereof as far as the named insured was concerned, and merely admitting that Claggett was driving the vehicle with the permission of Mrs. Mehlin. (Tr., p. 95.)

Thereafter Mr. Castro related that the State Court action was tried with counsel for the insurance company representing Claggett. (Tr., p. 96.)

The foregoing is all of the evidence offered by appellee in support of the claim of waiver and estoppel. It is apparent that there is nothing in the foregoing statement of evidence that would indicate any knowl-

edge on the part of the insurance company concerning the facts and circumstances under which the vehicle was brought to California.

Section B.

Mr. William Hunt, an assistant claims manager for the insurance company testified. (Tr., pp. 164 to 189.) Mr. Hunt said that the insurance company received its first notice that the automobile had been taken out of the State of Nebraska without the permission of the named insured in the early part of July, 1948, and less than a week before the actual trial date. (Tr., p. 165.) He said that upon receipt of this information he sent a teletype message to the St. Paul office asking for a thorough investigation and requesting the obtaining of a nonwaiver agreement from the assured, and that a nonwaiver agreement was also obtained from Mr. Claggett, the driver of the car, under date of July 9, 1948. This was taken in the State of Nebraska. (Tr., p. 166.)

Mr. Hunt also testified that after learning from his counsel the information relating to the removal of the car from Nebraska, the insurance company obtained statements from the named insured and his wife under date of August 25, 1948. This was after the trial of the case in the State Court and they were taken in Nebraska. (Tr., pp. 168 and 169.) These statements were the first statements that were taken from Mr. and Mrs. Mehlin by the insurance company that dealt with the subject of the taking of the car from the State of Nebraska. (Tr., p. 169.) Mr. Hunt said that

after these statements were taken by counsel in Nebraska on August 25th and referred out to the California office that was the first information Mr. Hunt had of the details concerning the taking of the automobile out of the State of Nebraska. (Tr., p. 170.)

Mr. Hunt said that no statement had been taken from the assured before that because he was not in the car at the time of the accident. (Tr., p. 171.)

Mr. Hunt also established the limited authority of Mr. Gripenstraw and Mr. Dennis, namely, that they were adjusters who investigated accidents and negotiated settlements with limited authority up to \$3,000. (Tr., pp. 172 and 173.)

Mr. Hunt, under cross-examination, testified that the insurance company knew that Claggett had the permission of Mrs. Mehlin, and that they did not question the coverage because Mrs. Mehlin said she was the wife out here for a visit and the company assumed that being the wife she had the husband's permission. (Tr., p. 175.) He also testified that during the settlement negotiations the company thought the policy covered and that they did not make any check in Nebraska about it because they assumed that the information the company had obtained from Mrs. Mehlin was correct, namely, that Claggett was driving with her permission. (Tr., p. 175.)

Further cross-examination reveals the following:

“Q. (By Mr. Boyd): Isn't it a fact, Mr. Hunt, that at the time you authorized your adjustor to offer \$7500, the only information that

you had had or requested from Mrs. Mehlin was whether or not she had authorized Mr. Claggett to drive that car?

A. That's correct, yes." (Tr., p. 176.)

Mr. Hunt was unable to say how the summons and complaint came into the office, but the record indicated it had been served on Claggett the 27th of December, 1947, approximately two months after the accident. (Tr., p. 178.)

Mr. Hunt also testified, under cross-examination, as follows:

"Q. Now, Mr. Hunt, at the time that you first contacted Mr. Claggett, there was no doubt in your mind at that time but that he was operating the car with Mrs. Mehlin's permission, is that true?

A. That is right, with her permission; that is right.

Q. And there was no doubt in your mind at that time that the policy covered Mr. Claggett, was there?

A. As far as we knew at that time, that is correct.

Q. And during the time that you were negotiating with Mr. Castro through your adjustor, there was no doubt in your mind but that the policy covered Mr. Claggett, was there?

A. No, I don't think we would have had negotiations if there was any doubt in our minds.

Q. If Mr. Gripenstraw stated to Mr. Castro that the automobile was being operated with the permission of the owner at the time that he was

negotiating, that would have been with your full approval, would it not, sir?

A. I am sure Mr. Gripenstraw didn't make that statement.

Q. If he had made that statement you certainly would have had no objection to it?

A. I could have objected; I wouldn't be bound by his statements." (Tr., pp. 182 and 183.)

And at page 186 he testified:

"Q. And during the months of November, December of 1947, January, February, March, April, May and June of 1948, you never questioned the company's coverage for Mr. Claggett, did you?

A. We didn't question the coverage until we found out the truth of the situation from Nebraska."

And at page 188:

"Q. Is there anything in the file that indicates that the Nebraska office at any time up until this deposition was taken had contacted either Mr. or Mrs. Mehlin?

A. There is nothing in our file that would indicate it."

The insurance company called as a witness John Dennis, claim adjuster who investigated the accident on behalf of the insurance company, who said his duties were to investigate accidents and compromise claims. He first learned of the case the first week in November. By that time a proof of loss had been filed by Mrs. Mehlin, and he then interviewed the driver Claggett and took a statement from him. (Tr., pp.

189 to 191.) He also interviewed Mrs. Mehlin in Richmond, California. Mrs. Mehlin did not tell Mr. Dennis that she had taken the car from Nebraska without her husband's permission. (Tr., p. 192.) What she did tell him was that she was visiting in California, and that her husband was at home. She stated also that she did not know how long she would be in California since she was visiting with friends. (Tr., pp. 192 and 193.) He asked for her home address, which she gave as the Lincoln, Nebraska, address. This Lincoln, Nebraska, address was also set forth in the proof of loss that Mrs. Mehlin had submitted. (Tr., p. 193.) Mrs. Mehlin also confirmed that Claggett had been driving the car with her permission. (Tr., p. 193.)

On cross-examination Mr. Dennis testified that he asked about the visit of Mrs. Mehlin, and that he did not question her about Mr. Mehlin, except that he was at home, and that he did not ask Mrs. Mehlin if she had permission of her husband to take the automobile, and when asked why he did not ask her that question, Mr. Dennis replied that he did not think the question occurred to him. (Tr., p. 195.) He also assumed that the wife had permission to use the automobile and to give anyone else permission. Mr. Dennis also had learned that Claggett came from Minnesota, and that he was living in Richmond on a temporary basis. (Tr., pp. 195 and 196.) (This would indicate that both the assured's wife and Claggett were acquainted in the middle west, although Mr. Dennis learned that Mr. Claggett did not know Mr. Mehlin.) (Tr., p. 196.) In this connection, Mr. Dennis said that he is not em-

ployed to make assumptions, but to contact the witnesses and the driver of the car; that on the face of it there was nothing to arouse suspicion and his function was to learn about the accident. (Tr., p. 196.)

Mr. Dennis also went on to relate how his function did not include passing on coverage questions, but merely involved collecting the facts. (Tr., pp. 196 to 198.)

It was developed that Mr. Claggett was being represented by his own attorney in connection with the criminal charges. (Tr., p. 199.) Mr. Dennis did not see Mr. Claggett except to get his statement from him about the accident until the time of trial. (Tr., p. 200.)

Mr. Dennis testified affirmatively that Mrs. Mehlin never at any time told him that she had separated from her husband or that she had taken the car out of the State of Nebraska without her husband's consent.

On February 1, 1948, after settlement negotiations had terminated the insurance company's Nebraska office wrote to the company to find out whether Claggett was a possible agent of the assured at the time of the accident, since the file did not reflect clearly on this subject. On February 24, 1948, the California office replied by stating that the use of the car was a personal one and no agency was involved.

Appellant called Louis G ripen straw, who testified (Tr., pp. 208 to 218). He said he was a claim adjuster and that he talked to attorney Castro at the end of

December, a few days after Claggett had been served. He secured an extension of time to plead and asked for a demand of settlement. He did not recall any conversation about permissive use and he made no statement to Mr. Castro in that connection. Policy coverage was not discussed. (Tr., p. 209.)

He had a second conversation with Mr. Castro to secure more time to plead, but made no offer of any amount to settle and said he had no authority to make an offer, and denied that he made any statement that there was no question about permissive use of the automobile.

On cross-examination he said he did not even have a file on this case because he worked out of the San Francisco office as an investigator. He believed he was obtaining time to plead for all parties, or in any event, to keep the time open pending investigation and settlement negotiations. (Tr., pp. 212 and 213.) He did not know who had been served. He did not have very much familiarity with the file. (Tr., p. 214.) He said he had authority to settle cases up to \$3,000.

Mr. Bledsoe, one of the attorneys for the insurance company who handled the State Court action, testified. (Tr., pp. 218 to 245.) His testimony was to the effect that the insurance company file was referred to his office February 7, 1948; that he first saw the file July 2, 1948, after a continuance had been refused and it became necessary for him to prepare it for trial; that he saw a letter in the file dated April 19, 1948, from attorneys in Nebraska which indicated that Mrs.

Mehlin had not had permission to bring the car to California. The next day, July 3rd, Mr. Bledsoe testified that he advised Mr. Crowley in Mr. Castro's office of a possible coverage question and that he asked for a continuance of the trial. The continuance was refused. He also testified that he tried to locate Claggett at the California address in Richmond without success. (Tr., p. 222.) He likewise advised Mr. Crowley that he wanted to amend the answer to change the admission with reference to permissive use, and that he quoted the letter from the Nebraska attorneys to Mr. Crowley concerning Mr. Mehlin's contentions about his wife's leaving Nebraska. (Tr., p. 223.) He prepared a motion for a continuance and a motion for leave to amend and also an amended answer. He telephoned the State Farm after the July 4th holiday, which was the first date they were open after he had seen the file, and told them to locate Claggett and get a reservation of rights agreement from him; to interview the Mehlin's, and get statements from them about the permissive use question and to try to get Claggett to come to California for the trial. He made a motion for a continuance and for leave to amend, both of which were granted. At the time these motions were presented both the State Court judge and opposing counsel were told of the policy coverage question. (Tr., pp. 227 and 228.)

Mr. Bledsoe first talked to Mr. Claggett July 13th, just before trial and secured a nonwaiver agreement from him and secured his permission to waive a jury. The nonwaiver agreement appears at Tr., p. 231. An

earlier agreement had been obtained from Claggett in Nebraska on July 9, 1948. After the trial Mr. Bledsoe was asked by Mr. Castro if the coverage question was good and Mr. Bledsoe stated he did not know because he had not yet obtained statements from the Mehlin's. (Tr., p. 235.) Mr. Bledsoe also testified that they continued to represent Claggett because they did not feel that it would be proper to desert him on the eve of trial. He also testified that as soon as he got the continuance of the trial he telephoned the attorneys in Nebraska, who had written in April, and asked them to confirm the information supplied in their letter. (Tr., p. 236.)

This testimony was also to the effect that there was no information in his file indicating that there was no coverage, or that the automobile had been taken from Nebraska without the permission of the named assured, except the letter from the Nebraska attorney, which was not received until April, 1948. (Tr., p. 237.) (There were no settlement negotiations after April, except a plea for a continuance with a suggestion that settlement negotiations might be resumed, which plea was rejected by counsel for the plaintiff.)

It was likewise testified to that Mr. Claggett was never seen by anyone in the attorney's office until July 13, 1948, when he came out to California for the trial. (Tr., p. 238.) Similarly, counsel had never talked to Mr. and Mrs. Mehlin and had no statements from them until after the case was tried in the State Court. (Tr., p. 238.)

On cross-examination, Mr. Bledsoe also testified to the effect that the answer had been prepared on the basis of information contained in the insurance company's file, which had the statement of Claggett and the formal proof of loss by Mrs. Mehlin, neither of which contained any hint or information that the vehicle was in California without the consent of the assured.

There had been no communication with Mr. Claggett on the part of counsel, except letters written to him to advise him of the trial date, which Claggett had never answered. There was correspondence with him after the trial to advise him that no appeal would be taken. (Tr., p. 244.)

Section C.

Section 404 of the 1947 California Vehicle Code:

"Service of Process on Nonresident.

(a) (Service on Director of Motor Vehicles.) The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any use of the highways of this State as evidenced by the operation by himself or agent of a motor vehicle upon the highways of this State or in the event such nonresident is the owner of a motor vehicle then by the operation of such vehicle upon the highways of this State by any person with his express or implied permission, is equivalent to an appointment by such nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against

said nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle upon the highways of this State by himself or agent.

(b) (Same: Force and validity.) The acceptance of such rights and privileges or use of said highways shall be a signification of the agreement of said nonresident that any such process against him which is served in the manner herein provided shall be of the same legal force and validity as if served on said nonresident personally in this State.

(c) (Same: Manner of service.) Service of such process shall be made by leaving a copy of the summons and complaint with a fee of two dollars (\$2) for each nonresident to be so served in the hands of the director or in his office at Sacramento and such service shall be a sufficient service on said nonresident subject to compliance with subdivision (d) hereof.

(d) (Mailing of notice of service and copy of summons and complaint: Personal service equivalent to mailing.) A notice of such service and a copy of the summons and complaint shall be forthwith sent by registered mail by the plaintiff or his attorney to said defendant. Personal service of such notice and a copy of the summons and complaint upon said defendant wherever found outside this State shall be the equivalent of said mailing.

(e) (Same: Proof of compliance with subsection (d).) Proof of compliance with subsection (d) hereof shall be made in the event of service by mail by affidavit of the plaintiff or his attorney

showing said mailing, together with the return receipt of the United States post office bearing the signature of said defendant. Such affidavit and receipt shall be appended to the original summons which shall be filed with the court from out of which such summons issued within such time as the court may allow for the return of such summons. In the event of personal service outside this State such compliance may be proved by the return of any duly constituted public officer, qualified to serve like process of and in the State or jurisdiction where the defendant is found, showing such service to have been made. Such return shall be appended to the original summons which shall be filed as aforesaid.

(f) (Continuances.) The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

(g) (Record of process and service.) The director shall keep a record of all process so served upon him which record shall show the day and hour of service.

(g) ('Nonresident' defined.) As used in this section 'nonresident' means a person who is not a resident of this State at the time the accident or collision occurs."

No. 12,531

IN THE

United States Court of Appeals
For the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE IN-
SURANCE COMPANY (a corporation),

Appellant,

vs.

BERTHA LEE PORTER, as Special Ad-
ministratrix of the Estate of Charles
E. Porter, Deceased,

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

	Page
I. Statement of facts	1
II. Summary of argument	12
III. Argument	15
A. California rule of conflicts of law applicable.....	15
1. California rule on motions for directed ver- dict and judgment non obstante veredicto....	17
B. Sufficiency of evidence as to permissive use, waiver and estoppel sole issue on appeal.....	18
C. Evidence legally sufficient to establish permission	19
1. Inference of implied permission.....	21
a. Mehlin's wife was husband and wife.....	21
b. Mrs. Mehlin had unrestricted right to use automobile	21
c. Claggett had express permission from Mrs. Mehlin	22
2. Admissions of coverage and permission by Insurer	23
a. By claims adjusters Dennis and Gripen- straw	23
b. By Insurer's attorneys	24
i. Affidavit of Dana inadmissible; if admissible, it supports inference In- surer's file showed Claggett had per- mission of named insured	26
3. Presumptions established permission	28
4. Appellee's proof not dispelled by Insurer's evidence	29
a. Insurer's citations that inferences or pre- sumptions of permission vanish not in point	34
b. Insurer's citations that only a permittee of named insured is covered not in point	35

	Page
i. California cases	35
ii. Cases where permissive use was not in issue	36
iii. Federal court cases where the evi- dence was uncontradicted	37
iv. Federal court cases where the trier of fact decided in favor of the de- fendant	37
D. Evidence legally sufficient to establish waiver and estoppel	38
1. Appellee is beneficiary of this policy.....	38
2. Waiver and estoppel defined and distinguished	40
a. Constructive knowledge is sufficient for waiver	42
i. Insurer's citations are not in point..	43
b. Waiver implied from conduct of Insurer	45
c. Elements of estoppel not required for waiver	47
d. Change of position or prejudice not re- quired for waiver	48
3. Constructive knowledge of Insurer shown by evidence	48
4. Actual knowledge of Insurer shown by evi- dence	50
5. Intent of Insurer to waive shown by evidence of Insurer's conduct	51
a. Insurer's conduct not justified by In- surer's alleged failure to inquire of al- leged policy defenses	52
6. Detriment to Appellee shown by evidence...	54
a. Appellee lost right to fairly appraise set- tlement offers	54
b. Appellee incurred trouble and expense of commencing and preparing death action for trial	56

	Page
7. Omnibus clause is subject to waiver.....	57
a. A new risk not being created.....	59
b. Nebraska has held that an insurer waived or was estopped to assert a defense of non-coverage	60
c. California has held that an insurer waived or was estopped to assert a de- fense of non-coverage	62
8. Non-waiver clauses subject to waiver and estoppel	65
9. Authority to waive	73
10. Reservation of rights did not cure waiver and estoppel	75
11. "Principally garaged and used" provision not violated	76
a. Uncertainty of such provision makes it unenforceable	76
b. Waiver and estoppel preclude Insurer's right to assert such defense.....	79
IV. Conclusion	80

Table of Authorities Cited

Cases	Pages
Abrams v. American F. & C. Co. (1948), 32 C. (2d) 233, 195 P. (2d) 797	75
Aetna Life Ins. Co. v. Dunn (1936, C.C.A. 3d, N.J.), 84 F. (2d) 752	20
American Casualty Co. v. Windham (1939, C.C.A. 5th, Ga.), 107 F. (2d) 88	20
American Fire Ins Co. v. Landfare (1898), 56 Neb. 482, 76 N.W. 1068	67, 68
Andrews v. Commercial Casualty Ins. Co. (1935), 128 Neb. 496, 259 N.W. 653	20
Andrus v. Maryland Casualty Co. (1904), 90 Minn. 358, 98 N.W. 200	72
Anthony v. Hobbie (1945), 25 C. (2d) 814, 155 P. (2d) 826..	18
Arnold v. American Insurance Co. (1906), 148 Cal. 660, 84 Pac. 182	62, 64
Bachman v. Independence Indemnity Co. (1931), 112 Cal. App. 465, 297 Pac. 110.....	39
Bastanchury v. Times-Mirror Co. (1945), 68 C.A. (2d) 217, 156 P. (2d) 488	41, 47
Baxter v. National Mortgage Loan Co. (1935), 128 Neb. 537, 259 N.W. 630	42
Bayless v. Mull (1942), 50 C.A. (2d) 66, 122 P. (2d) 608... ..	20, 23, 36, 40
Billings v. German Ins. Co. (1892), 34 Neb. 502, 52 N.W. 397	19
Blank v. Coffin (1942), 20 C. (2d) 457, 126 P. (2d) 868.....	18, 20, 30, 33, 36
Burgess v. Cahill (1945), 26 C. (2d) 320, 158 P. (2d) 393	20, 36, 40
Card v. Minn. Fire Ins. Co. (1941), 139 Neb. 602, 298 N.W. 157	63, 66
Carnes & Co. v. Employers Liability Assur. Corp. (C.C.A. 5th, 1939), 101 F. (2d) 739.....	63
Chakmakjian v. Lowe (1949), 33 C. (2d) 308, 201 P. (2d) 801	30, 36

TABLE OF AUTHORITIES CITED

v

	Pages
C.I.T. Corp. v. American Cent. Ins. Co. (1937), 18 C.A. (2d) 673, 64 P. (2d) 742	79
Clay County Cotton Co. v. Home Life Ins. Co. (C.C.A. 8th, 1940), 113 F. (2d) 856	16
Cohen v. Metropolitan Life Ins. Co. (1939), 32 C.A. (2d) 337, 89 P. (2d) 732	43
Columbia Cas. Co. v. Lyle (C.C.A. 5th, 1936), 81 F. (2d) 281	37
Commercial Standard Ins. Co. v. Robertson (C.C.A. 6th, 1947), 159 F. (2d) 405.....	44, 64
Conner v. Union Auto. Ins. Co. (1932), 122 Cal. App. 105, 9 P. (2d) 863	63
Continental Casualty Co. v. Curtis Publishing Co. (C.C.A. 3d, 1938), 94 F. (2d) 710.....	56
Coward v. Clanton (1889), 79 Cal. 23, 21 Pac. 359.....	25
Craig v. White (1921), 187 Cal. 489, 202 Pac. 648.....	42
Curry v. Williams (1930), 109 Cal. App. 649, 293 Pac. 623..	17
Cutler v. Roberts (1878), 7 Neb. 4, 29 Am. Reports 371....	42
Delanoy v. Delanoy (1932), 216 Cal. 27, 13 P. (2d) 719....	17
Dieterle v. Yellow Cab Co. (1939), 34 C.A. (2d) 97, 93 P. (2d) 171	18
Dolinar v. Pedone (1944), 63 C.A. (2d) 169, 146 P. (2d) 237	25
Empire State Surety Co. v. Pac. Nat. Lumber Co. (C.C.A. 9th, 1912), 200 Fed. 224	75
Engstrom v. Auburn Auto. Sales Corp. (1938), 11 C. (2d) 64, 77 P. (2d) 1059	29, 30, 36
Erie Railroad Co. v. Tompkins (1938), 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188	16, 38
Erskine v. Upham (1942), 56 C.A. (2d) 235, 132 P. (2d) 219	47
Farnum v. Phoenix Ins. Co. (1890), 83 Cal. 246, 23 Pac. 869	19, 62, 72
Fidelity & Guaranty Fire Corp. v. Bilquist (C.C.A. 9th, 1938), 99 F. (2d) 333	63, 64
Fidelity Mutual Fire Ins. Co. v. Lowe (1903), 4 Neb. 159, 93 N.W. 749	66, 68
First Nat'l Bank v. Davis (1932), 123 Neb. 304, 242 N.W. 655	42
Flood, Estate of, (1933), 217 Cal. 763, 21 P. (2d) 579....	18, 29, 34

	Pages
Frederick Sage & Co. v. Alexander & Oviatt Corp. (1934), 138 Cal. App. 476, 32 P. (2d) 655.....	17
Fredericksen v. Employers (C.C.A. 9th, 1928), 26 F. (2d) 76	38, 51
Gajanich v. Gregory (1931), 116 Cal. App. 622, 3 P. (2d) 389	25
George v. Guarantee Mut. Life Co. (1944), 144 Neb. 285, 13 N.W. (2d) 176	44
Georgia Casualty Co. v. Waldman (1931, C.C.A. 5th, Ala.), 53 F. (2d) 24	20
German Insurance Co. v. Heidnuk (1890), 30 Neb. 288, 46 N.W. 481	66, 67
German Mutual Fire Ins. Co. v. Palmer (1902), 3 Neb. 688, 92 N.W. 624	46, 61, 66, 67
German Insurance Co. v. Shader (1903), 68 Neb. 1, 93 N.W. 972	61, 66, 68, 71, 75
Gish v. Los Angeles Ry. Corp. (1939), 13 C. (2d) 570, 90 P. (2d) 792	18, 29
Gladding v. California etc. Ins. Co. (1884), 66 Cal. 6, 4 Pac. 764	69
Glens Falls Indem. Co. v. Zurn (1937, C.C.A. 7th, Wis.), 87 F. (2d) 988	20
Goode v. Smith (1859), 13 Cal. 81	26
Grant v. Sun Indemnity Co. (1938), 11 C. (2d) 438, 80 P. (2d) 996	68, 73
Haggard v. Frick (1935), 6 C.A. (2d) 392, 44 P. (2d) 447..	22
Hamilton v. Home Fire Ins. Co. (1894), 42 Neb. 883, 61 N.W. 93	44
Hanchett v. Wisely (1930), 107 Cal. App. 230, 290 Pac. 311	30, 34
Hancock Etc. Ins. Co. v. Markowitz (1944), 62 C.A. (2d) 388, 144 P. (2d) 899	63
Hanover Fire Ins. Co. v. Gustin (1894), 40 Neb. 828, 59 N.W. 375	19
Hargett v. Gulf Ins. Co. (1936), 12 C.A. (2d) 449, 55 P. (2d) 1258	69
Harrell v. People's City Mission (1936), 131 Neb. 138, 267 N.W. 344	30, 34

	Pages
Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N.W. 779	41, 45, 48, 61, 66, 79
Hatfield v. Levy Bros. (1941), 18 C. (2d) 798, 117 P. (2d) 841	26
Hicks v. Reis (1943), 21 C. (2d) 654, 134 P. (2d) 788.....	33, 36
Higgins v. Old Line Ins. Co. (1932), 122 Neb. 254, 240 N.W. 275	61, 68
Hilton v. Federal Ins. Co. (1931), 118 Cal. App. 495, 5 P. (2d) 648	62
Holzer v. Read (1932), 216 Cal. 119, 13 P. (2d) 697.....	25
Home Fire Ins. Co. v. Kennedy (1896), 47 Neb. 138, 66 N.W. 278	56, 61
Home Fire Ins. Co. v. Kuhlman (1899), 58 Neb. 488, 78 N.W. 936	47, 48, 51, 61, 75
Home Fire Ins. Co. v. Phelps (1897), 51 Neb. 623, 71 N.W. 303	61
Home Indemnity Co. v. Standard Acc. Ins. Co. (C.C.A. 9th, 1948), 167 F. (2d) 919	40, 44
Home Ins. Co. v. Gibson (1894), 72 Miss. 58, 17 So. 13.....	72
Horn v. Commonwealth Casualty Co. (1929), 105 N.J.L. 616, 147 Atl. 483	57
Hunt v. State Ins. Co. (1902), 66 Neb. 121, 92 N.W. 921....	46, 61, 64, 66
Ingraham v. Smith (1948), 83 C.A. (2d) 807, 189 P. (2d) 721	26
Jensen v. New York Life (C.C.A. 8th, 1932), 59 F. (2d) 957	66, 67
Jensen v. Palatine Ins. Co. (1908), 81 Neb. 523, 116 N.W. 286	61
Jones v. Maria (1920), 48 Cal. App. 171, 191 Pac. 943.....	75
Kambourian v. Gray (1947), 81 C.A. (2d) 783, 185 P. (2d) 27	25
Kimbles v. Kelly (1935), 6 C.A. (2d) 91, 43 P. (2d) 871....	29, 35
Kindred v. Pacific Auto. Ins. Co. (1938), 10 C. (2d) 463, 75 P. (2d) 69	79
Klanecky v. Woodmen of World (1934), 126 Neb. 809, 254 N.W. 577	45

	Pages
Knarston v. Manhattan L. Ins. Co. (1899), 124 Cal. 74, 56 Pac. 773	65, 68
Kruger v. Western Fire & Marine Ins. Co. (1887), 72 Cal. 91, 13 Pac. 156	62, 64, 75
Laerabere v. Wise (1904), 141 Cal. 554, 75 Pac. 185.....	27
Lanfried v. Bosworth (1941), 45 C.A. (2d) 408, 114 P. (2d) 406	28
Long Island Ins. Co. v. Great Western Mfg. Co., 2 Kan. App. 377, 42 N.W. 739	72
Lydiek v. Gill (1903), 68 Neb. 273, 94 N.W. 109.....	47
Mackintosh v. Agricultural Fire Ins. Co. (1907), 150 Cal. 440, 89 Pac. 102	62, 64, 68, 69
Mario v. Yellow Cab Co. (1929), 208 Cal. 350, 281 Pac. 66...	17
Malmgren v. Southwestern A. Ins. Co. (1927), 201 Cal. 29, 255 Pac. 512	39
Maryland Casualty Co. v. Ronan (1930, C.C.A. 2d, Vt.), 37 F. (2d) 449, 72 A.L.R. 1360	20
Mayfield v. Fidelity & Casualty Co. (1936), 16 C.A. (2d) 611, 61 P. (2d) 83	19
McDanels v. General Ins. Co. (1934), 1 C.A. (2d) 454, 36 P. (2d) 829	44
McElroy v. Metropolitan Life Ins. Co. (1909), 84 Neb. 866, 122 N.W. 27	66, 67
Medico-Dental Etc. Co. v. Horton & Converse (1942), 21 C. (2d) 411, 132 P. (2d) 457.....	47
Mirich v. Underwriters at Lloyd's, London (1944), 64 C.A. (2d) 522, 149 P. (2d) 19	43
Montanya v. Brown (1939), 31 C.A. (2d) 642, 88 P. (2d) 745	30, 35, 36
Moon v. Moon (1944), 62 C.A. (2d) 185, 144 P. (2d) 596...	27
Morgenstern v. Ins. Co. of Philadelphia (1911), 89 Neb. 459, 131 N.W. 969	19
Myers v. McMaken (1937), 133 Neb. 524, 276 N.W. 167....	30, 34
Nash v. Wright (1947), 82 C.A. (2d) 467, 186 P. (2d) 686	18, 26, 28, 30, 36
Nat'l Aid Asso. v. Brachter (1902), 65 Neb. 378, 91 N.W. 379, 93 N.W. 1122	45

	Pages
Northern Assur. Co. v. Grand View Bldg. Asso. (1902), 183 U.S. 308, 46 L. Ed. 213	66, 67, 69
Northwestern Portland C. Co. v. Atlantic Portland C. Co. (1917), 174 Cal. 308, 163 Pac. 47.....	19, 42, 48
Oak Creek Bank v. Helmer (1899), 59 Neb. 176, 80 N.W. 891	44
Ogburn v. Travelers Ins. Co. (1929), 207 Cal. 50, 276 Pac. 1004	17
Oil Tool Exchange, Inc. v. Hasson (1935), 4 C.A. (2d) 544, 41 P. (2d) 211	27
Palmer v. Hoffman (1943), 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645	16
Panhans v. Associated Indemnity Corp. (1935), 8 C.A. (2d) 532, 47 P. (2d) 791	39
Parke v. Franciscus (1924), 194 Cal. 284, 228 Pac. 435.....	19
People v. Barnett (1929), 99 Cal. App. 409, 278 Pac. 885...	27
Peterson v. Maloney (1930), 181 Minn. 437, 232 N.W. 790..	57
Philleo v. Hefnider (1942), 140 Neb. 808, 2 N.W. (2d) 31...30, 34	
Phillips v. Southern Pacific Co. (1936), 14 C.A. (2d) 454, 58 P. (2d) 688	29
Phoenix Ins. Co. v. Holcomb (1899), 57 Neb. 622, 78 N.W. 300	74
Pickens v. Maryland Casualty Co. (1942), 141 Neb. 105, 2 N.W. (2d) 593	66, 68
Prickett v. Whapples (1935), 10 C.A. (2d) 701, 52 P. (2d) 972	28
Purcell v. Pacific Automobile Ins. Co. (1937), 19 C.A. (2d) 230, 64 P. (2d) 1114	78
Raulet v. Northwestern Natl. Ins. Co. (1910), 157 Cal. 213, 107 Pac. 292	68
Reed v. Cortez (1948), 88 C.A. (2d) 416, 198 P. (2d) 911...	36
Reid v. Northern Assur. Co. (1923), 63 Cal. App. 114, 218 Pac. 290	62, 64, 69
Reidy v. Collins (1933), 134 Cal. App. 713, 26 P. (2d) 712..	27
Rieger v. London Guaranty & Acc. Co. (1919), 202 Mo. App. 184, 215 S.W. 920	75
Riverside Rancho Corp. v. Cowan (1948), 88 C.A. (2d) 197, 198 P. (2d) 526	26

	Pages
Royal Indemnity Co. v. Watson (C.C.A. 5th, 1932), 61 F. (2d) 614	40, 44
Sampson v. Channell (C.C.A. 1st, 1940), 110 F. (2d) 754...	16
Sawyer v. Sovereign Company (1920), 105 Neb. 395, 181 N.W. 191	45
Scheff v. Roberts (Mar. 1950), 35 A.C. 10, 215 P. (2d) 925...	20, 21
Shapiro v. Equitable Life Assur. Soc. (1946), 76 C.A. (2d) 75, 172 P. (2d) 725	42
Slobodisky v. Phenix Ins. Co. (1898), 53 Neb. 816, 74 N.W. 270	19
Snedker v. Derby Oil Co. (1948), 164 Kan. 640, 192 Pac. 135	57
Soehner v. Grand Lodge (1905), 74 Neb. 399, 104 N.W. 871	65
Souza v. Corti (1943), 22 C. (2d) 454, 139 P. (2d) 645.....	20, 22, 23, 28, 35, 40
Spiegelman v. Metropolitan L. Ins. Co. (1937), 21 C.A. (2d) 299, 68 P. (2d) 1006	47
Steil v. Sun Insurance Office (1916), 171 Cal. 795, 155 Pac. 72	62
Stewart v. Norsigian (1944), 64 C.A. (2d) 540, 149 P. (2d) 46	22, 36
Sutton v. Hawkeye Casualty Co. (C.C.A. 6th, 1943), 138 F. (2d) 781	77
Tevis v. Pitcher (1858), 10 Cal. 465.....	17
Tieman v. Red Top Cab. Co. (1931), 117 Cal. App. 40, 3 P. (2d) 381	25
Trotter v. Union Ind. Co. (C.C.A. 9th, 1929), 35 F. (2d) 104	37, 50
U.S.F. & G. Co. v. Mann (C.C.A. 4th, 1934), 73 F. (2d) 465..	37
Va. Automobile Ins. Co. v. Brillhart (1948), 187 Va. 336, 46 S.E. (2d) 377	57
Van Meter v. Franklin Fire Ins. Co. (C.C.A. 9th, 1947), 164 F. (2d) 325	16, 63, 64
Vaughn v. Jonas (1948), 31 C. (2d) 586, 191 P. (2d) 432...	28
Vezolles v. Home Indem. Co. (1941, D.C. Ky.), 38 F. Supp. 455	20
Vondepitte v. Preferred Acc. Ins. Co. (1929), 42 B.C. 255, 2 D.L.R. 562	57

Pages

Weissbaum v. Eibeshutz (1930), 211 Cal. 170, 294 Pac. 396	25
Wigington v. Ocean Acc. & Guarantee Co. (1930), 120 Neb. 162, 231 N.W. 770	36, 44
Wilkins v. State Ins. Co. (1890), 43 Minn. 177, 45 N.W. 1..	72
Witthauer v. Paxton-Mitchell Co., et al. (1945), 146 Neb. 436, 19 N.W. (2d) 865	30, 34
Wolf v. Dwelling House Ins. Co. (1898), 75 Mo. App. 337..	72

Codes

Calif. Civ. Code, Sec. 19	42
Calif. Code of Civ. Proc., Secs. 1963(1) and (33).....	28
Calif. Vehicle Code, Sec. 402	20

Texts

29 Am. Jur. 623	65
29 Am. Jur. 624	72
56 Am. Jur. 103	40
1 Cal. Jur. 677, et seq.	27
25 Cal. Jur. 927	42
27 R.C.L. 908	42

No. 12,531

IN THE
United States Court of Appeals
For the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (a corporation),

Appellant,

vs.

BERTHA LEE PORTER, as Special Ad-
ministratrix of the Estate of Charles
E. Porter, Deceased,

Appellee.

BRIEF FOR APPELLEE.

I.

STATEMENT OF FACTS.

On November 1, 1947, Charles E. Porter died from injuries sustained by him as a pedestrian in a crosswalk at Richmond, California, when struck by an automobile negligently driven by Duane R. Claggett on October 31, 1947.

Charles E. Porter left surviving him as his only heirs at law, Bertha Lee Porter, his wife, and his minor children, Charles Earl, Richard and Patricia Sue (hereinafter called Appellee).

On August 22, 1947, Appellant, State Farm Mutual Automobile Insurance Company, a corporation (hereinafter called Insurer), issued its standard service automobile insurance policy to Wilbur Mehlin, whereby it insured such automobile and agreed under Coverage A "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, because of bodily injury * * * and death at any time resulting therefrom, sustained by any person * * *, caused by accident and arising out of the ownership, operation, maintenance or use of * * *" such automobile* (Transcript, p. 30). It defined the term "Insured" as follows:

"The unqualified word 'insured' wherever used in Coverage A and in other parts of this policy when applicable to Coverage A includes the named insured and, except where specifically stated to the contrary, also includes

(a) the spouse of the named insured residing in the same household as the named insured.

(b) any other person but only while using the described automobile and any person or organization legally responsible for the use thereof provided the actual use of the described automobile is with the permission of the named insured." (T. 33.) (Hereinafter called Omnibus Clause.)

It applied to accidents occurring in the U.S.:

"This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United

*Hereinafter referred to as T.

States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations" (T. 38).

It authorized the use of the automobile:

"* * * for pleasure and business which is defined as personal pleasure, family and business use, * * *" (T. 51).

On February 21, 1941, Wilbur E. Mehlin and Carol Mehlin intermarried and at all times thereafter were husband and wife. In January, 1946, Mr. Mehlin purchased such automobile for the sum of \$350.00 (T. 51). The money to purchase the automobile came from his mustering out pay from the Army, money Mrs. Mehlin had in the bank, which she received from Mr. Mehlin while he was in the Army* and the balance was paid by Mr. Mehlin (T. 133, 136).

Mr. and Mrs. Mehlin had one child, a son, and made their home at Lincoln, Nebraska (T. 131). After the automobile was purchased, Mrs. Mehlin learned to drive it and obtained a driver's license to operate it (T. 148). Mr. Mehlin left the automobile at home for Mrs. Mehlin's use two or three days a week and he authorized her to use it for "what business she had" (T. 137) and Mrs. Mehlin could use it any time she wanted the car (T. 149).

On October 14, 1947, Mrs. Mehlin, accompanied by her son and Paul Weisberger and Phil Curren, drove

*The record does not show whether it was a family allowance from the United States.

the automobile to Richmond, California for a visit (T. 144, 192-3). While in California, she stayed at the residence of Carl Claggett and his family.

It is admitted by Insurer that at the time of this accident on October 31, 1947, Duane R. Claggett (hereinafter called Claggett) had the permission of Mrs. Mehlin to use this automobile (opening brief, p. 11).*

Three days after the accident, Mrs. Mehlin reported it to Insurer in a written notice (T. 153) and gave as her mailing address her residence with Mr. Mehlin, at Lincoln, Nebraska (T. 193). Before it investigated this accident, William R. Hunt, assistant claims superintendent in Northern California for Insurer, contacted Insurer's Nebraska office to ascertain whether it had insurance coverage of this automobile. On November 3, 1947, Insurer's Nebraska office verified its insurance coverage and learned that Mr. Mehlin was a resident of Lincoln, Nebraska (T. 174).

Between November 3 and 7, 1947, Insurer referred this claim to John Dennis (hereinafter called Dennis), one of its claims adjusters, for investigation (T. 190). At the time it assigned such risk for investigation, Insurer knew these facts:

(1) Its Nebraska office had issued its standard service automobile policy to Mr. Mehlin, a resident of Lincoln, Nebraska, covering this automobile, which was licensed by the State of Nebraska (T. 51, 174).

(2) Mrs. Mehlin had reported this accident to Insurer's office at Berkeley, California (T. 174).

*Hereinafter referred to as B.

(3) At the time of this accident, Claggett was driving such automobile at Richmond, California, with the express permission of Mrs. Mehlin (T. 174).

(4) In the absence of waiver or estoppel on its part, Insurer's omnibus clause required the use of the automobile to be with the permission of its named insured, Mr. Mehlin; otherwise Insurer could deny liability for such accident (T. 33).

One of the duties of Dennis and Hunt was to determine facts from which Hunt or his superior, G. E. Meyers (hereinafter called Meyers), claims superintendent for Insurer in Northern California, could decide whether its policy covered this accident (T. 152, 174, 197).

On November 7, 1947, Insurer learned these additional facts:

(1) Its named insured, Wilbur Mehlin, was in Lincoln, Nebraska; Claggett was not personally acquainted with him; and it was physically impossible for Mr. Mehlin to have personally given Claggett permission to use this automobile (T. 196-7);

(2) Mrs. Mehlin had brought this automobile to and was staying at Richmond, California (T. 193).

On November 10, 1947, Louis V. Crowley, one of the attorneys for Appellee, wrote Insurer, stating that he represented Appellee and would discuss settlement without the expense of litigation (T. 83). On November 14, 1947, Meyers acknowledged receipt of such letter and replied that Insurer was unable to find any record of any policy issued to Claggett (T. 84).

On December 3, 1947, Dennis telephoned Appellee's attorneys and talked to Augustus Castro (hereinafter called Castro) and informed him that Insurer had a policy covering this accident and Insurer's previous report that it did not have such insurance was in error (T. 85). Upon learning of such insurance coverage, Appellee commenced an action in the Superior Court of the State of California, in and for the County of Contra Costa, to recover damages for the wrongful death of said Charles E. Porter, caused by the negligence of Claggett in driving said automobile, and joined as defendants Mr. and Mrs. Mehlin, upon the grounds, among others, that Claggett was driving with the permission of said Mehlin, the owners of said automobile (T. 90-91).

On December 27, 1947, at Richmond, California, summons was personally served upon Claggett in said action (T. 178). Thereafter, at the request of Insurer, Claggett caused the copy of the summons and complaint served on him to be delivered to Insurer (T. 176) for its defense.

Upon receipt of such summons and complaint, Insurer accepted the defense of such action on behalf of Claggett and instructed its claims adjuster, Louis Gripenstraw (hereinafter called Gripenstraw), to contact Appellee's attorneys. On December 31, 1947, Gripenstraw called at their office and met Castro. In his conversation with Castro, Gripenstraw stated that Insurer had a policy covering this accident, that Mrs. Mehlin had permission to use the car and had given Claggett permission to use it and, after indicating that the limit of Insurer's policy was \$10,000.00,

offered Appellee \$7500.00 in settlement of her claim (T. 85-87). Appellee was advised of such offer of settlement by letter (T. 87).

On January 13 and 22, 1948, telephone conversations took place between Gripenstraw and Castro, wherein Insurer's offer of \$7500.00 was rejected and Gripenstraw stated it would be necessary for Insurer's board to pass on the case before any higher settlement authority could be obtained (T. 87-88).

On January 28, 1948, Meyers, Insurer's claims superintendent, instructed his assistant, Hunt, to and he did contact Castro for settlement of this case (T. 155-6). In such conversation, Hunt informed Castro that Insurer desired to settle this case and save the expense of turning it over to its attorneys for defense; that in such a case Insurer has paid \$8500.00 and in an exceptional case \$9000.00, where its policy limits were \$10,000.00, but at that time his authority was limited to \$7500.00 (T. 88). On February 5, 1948, by telephone, Castro informed Hunt that Appellee would not accept \$7500.00 and that Insurer should turn the case over to its attorneys as Appellee would have the matter tried (T. 89).

The record does not disclose the date Insurer's board first authorized payment of the sum of \$7500.00 but insurer set up a reserve of \$1500.00, which was increased to \$10,000.00, to cover this claim (T. 185-189), and it was stipulated that Hunt indicated to Castro that Insurer would pay \$8500.00 (T. 203).

On February 6, 1948, Insurer requested of Appellee a further extension of time within which to plead and

Appellee granted such extension (T. 89); and Insurer referred its file to its attorneys, Dana, Bledsoe & Smith for defense (T. 161).

A copy of Insurer's transmittal letter to Dana, Bledsoe & Smith was sent to its Nebraska office. On February 11, 1948, W. W. Gibson, claims manager of Insurer's Nebraska office, wrote its Berkeley office, attention of Hunt, assistant claims manager, that there was a question of permission and that the Berkeley office should send the excess suit notice letter to its insured, as the Berkeley office knew the intricacies of the California law with reference to permission. Gibson's letter was referred by Hunt to Dennis. On February 24, 1948, Dennis wrote a memorandum to Hunt in which he stated that Claggett was using the automobile with Mrs. Mehlin's consent for his own benefit (T. 204-206). On April 15, 1948, Meyers, Insurer's claim superintendent, wrote Mr. Mehlin an excess suit notice letter advising him:

(1) It had forwarded its file in this claim to Dana, Bledsoe & Smith for the handling of its defense;

(2) Requested Mr. Mehlin to comply with all requests from its attorneys, as they were its duly authorized representatives; and

(3) Informed Mr. Mehlin that in the event a judgment in such case exceeded its policy limit, Mr. Mehlin would have a "possible personal liability" (T. 205).

Insurer's attorneys prepared an answer in writing on behalf of Claggett to such complaint. On the 17th day of February, 1948, one of said attorneys, Mr.

Dana, verified such answer on behalf of Claggett, and such answer was thereafter filed in said wrongful death action. Such answer expressly admitted that Insurer's named insured, Mr. Mehlin, was the owner of this automobile and Claggett was driving it with his permission (T. 90-91).

In reliance upon Insurer's representations that Insurer had an automobile policy covering Claggett in this accident and that Claggett had proper permission to use such automobile, Appellee commenced the wrongful death action. In appraising the settlement value of her claim, and rejecting Insurer's offer of settlement, Appellee accepted as true and relied upon Insurer's representations, and did not conduct any independent investigation concerning the issue of permission. At the time the wrongful death action was commenced, Mrs. Mehlin had returned to Nebraska (T. 87). Service of summons was not made on either Mr. or Mrs. Mehlin, because, since Claggett had permission to use this automobile, he was entitled to the protection of such policy to the full extent of its limits, which exceeded the \$5000.00 ownership liability of Mr. and Mrs. Mehlin (T. 92).

In defense of Claggett, after filing such answer on his behalf, Insurer's attorneys performed the following acts:

- (1) On March 6, 1948, they wrote Claggett advising him of the trial date for such action, that his deposition would be taken and that they would keep in touch with him (T. 243).

- (2) On March 12, 1948, after a memorandum to set such action for trial was filed, they pre-

pared a formal stipulation setting such action for trial on July 7, 1948, and had the trial date set for July 7, 1948 (T. 92-93).

(3) On March 13, 1948, they wrote Claggett advising him of a change of the trial from July 6 to July 7, 1948 (T. 243).

(4) On two occasions, within a week to 10 days of the 7th of July, 1948, their Mr. Dana telephoned Castro requesting a continuance of such trial and stating he could work out a settlement if such continuance was granted (T. 93).

(5) On July 2, 1948, their Mr. Bledsoe telephoned the attorneys for Appellee, stating he was going to take over the file, as Mr. Dana could not try the case (T. 93).

(6) On July 6, 1948, Mr. Bledsoe telephoned Appellee's attorneys, stating that neither he nor Insurer had been able to locate Claggett in California and they could not produce him from Minnesota for the trial on July 7, 1948 (T. 94).

(7) On July 7, 1948, Insurer's attorneys (a) moved for a continuance upon the grounds that they had not been able to locate Claggett, and agreed that if the Court would grant such continuance Insurer would reimburse Appellee for the expense incurred by Mrs. Porter in traveling from her home in Huntington Park, California, to Martinez, California, the Court expenses covering the jury venire and the witnesses produced by Appellee. With such promise, the Court granted a continuance to July 14, 1948 (T. 94);

(b) informed Appellee's attorneys that Insurer had not obtained any reservation of rights from Claggett and that it was too late to take one, but one would be taken when Claggett arrived (T. 95); and (c) made a motion to amend Claggett's answer, which was granted, and they filed an amended answer on Claggett's behalf (T. 95).

(8) Between July 6 and 9, 1948, Insurer contacted Claggett at Mora, Minnesota, and arranged and paid for his transportation to and from Martinez, California (T. 233, 239). Prior to the 9th day of July, 1948, Insurer had not taken a reservation of rights agreement from Claggett.

Prior to July 2, 1948, Appellee's attorneys had prepared her case for trial, including the interviewing of witnesses on the issues raised by the pleadings of negligence, contributory negligence and cause of death, and had prepared instructions for the jury and were ready to go to trial on such issues in the wrongful death action.

On July 14, 1948, the trial of such wrongful death action took place. At such trial, Claggett was represented by Insurer's attorneys. Judgment was rendered in favor of Appellee against Claggett for the sum of \$30,000.00, together with costs. Following the Court's decision to enter such judgment, Insurer's attorneys objected to the written findings of fact and conclusions of law and orally argued their objections. After entry of judgment for said sum, Insurer's attorneys made and orally argued a motion for new trial on behalf of Claggett (T. 96-97).

Insurer paid Dana, Bledsoe & Smith for their services and expenses in representing Claggett on its behalf in such wrongful death action (T. 239).

II.

SUMMARY OF ARGUMENT.

A reading of Insurer's statement of questions involved and specifications of errors shows that Insurer's appeal is upon the sole ground that the trial Court erred in denying Insurer's respective motions for a directed verdict and a judgment *non obstante veredicto* (B. 3-7). Therefore, the only issue on appeal is whether there was sufficient evidence to submit the factual issues of permissive use, waiver and estoppel to the jury.

Since this is a diversity of citizenship case, tried in California, the trial Court was required to apply the same law that would be applied by a California Court to all matters of "substance." Questions of burden of proof, presumptions, sufficiency of evidence and the interpretation of the terms of an insurance policy are matters of substance.

The California rule of conflicts of law determines what law would be applied by a California Court to this controversy. Under the California conflicts of laws authorities: (1) California law governs all matters falling within the description of "burden of proof," such as presumptions and sufficiency of the evidence; (2) California law governs the interpretation of the rights and obligations of a contract made

in another State in the absence of a showing that a different rule should be applied.

Under the California rule, applicable to the sufficiency of the evidence to submit the issues to the jury, the trial Court must disregard all conflicting evidence and give to the evidence in support of plaintiff's burden of proof all the value to which it is legally entitled, indulging in every legitimate inference in favor of plaintiff which may be drawn therefrom. Likewise, on appeal, the Appellate Court's duty is the same.

The term "permission" in an omnibus clause of an automobile policy include "implied" permission which may be inferred by the jury from a course of conduct or a relationship and does not require affirmative action by the named insured. The omnibus clause is at least as broad as the owner's liability for permissive use under California Vehicle Code, Section 402.

To support such permission, the evidence shows that a portion of the money used to purchase the car came from Mrs. Mehlin's bank account; that the named insured, Mr. Mehlin, gave his wife the unrestricted general use of the automobile; that Mrs. Mehlin gave Claggett express permission to use the automobile; that agents of Insurer, after investigation of the accident and permissive use, admitted that Claggett had permission to use the car. The jury was, therefore, entitled to find that, as a permittee of Mrs. Mehlin, Claggett had the implied permission of Mr. Mehlin to use the automobile.

The alleged breaches of the policy and its non-waiver provisions were both subject to and were waived by Insurer, and Insurer is estopped to assert them.

To support such waiver and estoppel, the evidence shows that Insurer knew the terms of its policy; that Insurer, within a week after the accident, had constructive knowledge of its alleged defenses under its policy and had a right to deny all liability for this accident (if its policy were breached or did not cover the loss); that the circumstances of Claggett's possession of the car would have caused a prudent person to inquire whether Claggett had the permission of its named insured, Mr. Mehlin, to use the car or whether the place it was principally garaged or used had been changed. Under such circumstances, it was the duty of Insurer to make an inquiry concerning whether Claggett had permission to use the car (either from Mr. Mehlin expressly or impliedly through Mrs. Mehlin) or whether the place where the car was principally garaged or used had been changed. Insurer has admitted that it did make an inquiry as to permissive use and change of location, but now claims that its inquiry was inadequate; the evidence shows that Insurer had the means of knowledge at hand; Insurer is, therefore, chargeable with all the facts which, by a proper inquiry, it might have ascertained, namely, a possible lack of permission or a change of location.

Notwithstanding such knowledge on its part, Insurer represented to Appellee that its policy covered

this accident, that Claggett had permission to use the automobile, and that it would pay \$8500.00 of its \$10,000.00 limit to settle such wrongful death claim. In reliance upon such representations, Appellee rejected such settlement offer on the basis that since there was permission she was entitled to the limits of the policy; and she incurred the expense and trouble of bringing and preparing such death action for trial, all to her detriment. Insurer's conduct thereby waived its policy defenses, and Insurer is estopped to raise such defenses.

After such waiver or estoppel occurred, Insurer could not cure the same by giving Claggett a notice of reservation of rights or having him execute a reservation of rights agreement.

It is Appellee's position that the evidence was sufficient to support the jury's verdict in her favor.

III.

ARGUMENT.

A. CALIFORNIA RULE OF CONFLICTS OF LAW APPLICABLE.

In diversity of citizenship cases involving an insurance policy, questions of burden of proof, presumptions, sufficiency of evidence and the interpretation of rights and obligations under a policy are matters of substantive law in which it is the duty of the trial Court to apply the State rule of conflicts of law, which the State Court follows in the State in which the Federal Court is sitting in determining

whether the law of the forum or elsewhere is applicable.

Erie Railroad Co. v. Tompkins (1938), 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188;

Palmer v. Hoffman (1943), 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645;

Sampson v. Channell (C.C.A. 1st, 1940), 110 F. (2d) 754 (cert. denied, 310 U.S. 650, 60 S. Ct. 1099, 84 L. Ed. 1415), 54 Am. Jur. 970, 982;

Van Meter v. Franklin Fire Ins. Co. (C.C.A. 9th, 1947), 164 F. (2d) 325.

In *Clay County Cotton Co. v. Home Life Ins. Co.* (C.C.A. 8th, 1940), 113 F. (2d) 856, in reversing a directed verdict for defendant, it was stated:

“The appellee contends that in directing a verdict in this case the court was merely applying the procedure of the forum, that the federal decisions and not the law of Arkansas control; or in other words, that the problem presented is one of adjective and not substantive law. The question presented by the motion to direct a verdict was whether a cause of action had been proved, which clearly is a question of substantive law and the state law applied. * * * *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487.

Under the liberal rule of the Arkansas decisions, the case should have been submitted to the jury and, therefore, is reversed and remanded for a new trial.”

The California rule of conflicts of law is that (1) the law of the forum (California) governs all matters falling within the description of “Burden of Proof,”

such as presumptions, inferences and sufficiency of evidence, in determining motions for directed verdict and judgment *non obstante veredicto*, and (2) California law determines the validity and interpretation of the rights and obligations of a contract made in another State, in the absence of a showing that a different rule should be applied,

Teris v. Pitcher (1858), 10 Cal. 465, 466, 478
(method of proving will);

Curry v. Williams (1930), 109 Cal. App. 649,
293 Pac. 623 (law as to nonsuit);

Delanoy v. Delanoy (1932), 216 Cal. 27, 13 P.
(2d) 719 (presumption);

Ogburn v. Travelers Ins. Co. (1929), 207 Cal.
50, 276 Pac. 1004 (Texas contract interpreted
under California law);

*Frederick Sage & Co. v. Alexander & Oriatt
Corp.* (1934), 138 Cal. App. 476, 32 P. (2d)
655 (warranty implied under California law).

1. CALIFORNIA RULE ON MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NON OBSTANTE VEREDICTO.

California has set forth a number of well recognized principles which must be observed in determining whether motions for a directed verdict and judgment *non obstante veredicto* should be granted:

(a) Upon such motions, it is the trial Court's duty to view all the evidence in the light most favorable to plaintiff, resolve all conflicts in favor of plaintiff and indulge in every intendment and inference reasonably deducible from the proof in favor of plaintiff,

Mairo v. Yellow Cab Co. (1929), 208 Cal. 350,
351, 281 Pac. 66;

Dieterle v. Yellow Cab Co. (1939), 34 C. A. (2d) 97, 98, 93 P. (2d) 171.

(b) Evidence for the defense must be disregarded, and if there is evidence legally sufficient to support a verdict for plaintiff, it is the Court's duty to deny such motions, *Nash v. Wright* (1947), 82 C. A. (2d) 467, 470-473, 186 P. (2d) 686; *Est. of Flood* (1933), 217 Cal. 763, 768, 21 P. (2d) 579; the trial Court cannot weigh the evidence or determine the credibility of witnesses, as such issues are for the exclusive original determination of the jury, *Gish v. Los Angeles Ry. Corp.* (1939), 13 C. (2d) 570, 90 P. (2d) 792.

(c) The rule that an inference is dispelled by positive and direct evidence applies only when such evidence is not open to doubt and is produced by the party relying upon it (plaintiff herein) or his witnesses, *Nash v. Wright*, *supra*.

(d) The reviewing Court cannot reverse a judgment if the evidence of plaintiff standing alone would have warranted findings favorable to plaintiff (see, *Anthony v. Hobbie* (1945), 25 C. (2d) 814, 817, 155 P. (2d) 826), and only the evidence most favorable to the plaintiff may be examined, *Nash v. Wright*, *supra*.

**B. SUFFICIENCY OF EVIDENCE AS TO PERMISSIVE USE,
WAIVER AND ESTOPPEL SOLE ISSUE ON APPEAL.**

Permissive use, waiver (knowledge and intent), estoppel (conduct and detriment) and authority of agent is each a question of fact for a jury,

Blank v. Coffin (1942), 20 C. (2d) 457, 126 P. (2d) 868 (permission);

- Northwestern Portland C. Co. v. Atlantic Portland C. Co.* (1917), 174 Cal. 308, 313, 163 Pac. 47 (knowledge);
- Mayfield v. Fidelity & Casualty Co.* (1936), 16 C. A. (2d) 611, 61 P. (2d) 83 (waiver);
- Parke v. Franciscus* (1924), 194 Cal. 284, 228 Pac. 435 (estoppel);
- Farnum v. Phoenix* (1890), 83 Cal. 246, 262-263, 23 Pac. 869 (authority of agent).

Nebraska has applied the same rule as to agency.

- Hanover Fire Ins. Co. v. Gustin* (1894), 40 Neb. 828, 59 N.W. 375;
- Slobodisky v. Phenix Ins. Co.* (1898), 53 Neb. 816, 74 N. W. 270;
- Morgenstern v. Ins. Co. of Philadelphia* (1911), 89 Neb. 459, 131 N. W. 969;
- Billings v. German Ins. Co.* (1892), 34 Neb. 502, 52 N. W. 397, 399.

Because it is appealing from an order of the trial Court denying its motion for directed verdict and judgment *non obstante veredicto*, insurer has limited the issues of this appeal to the sole question—was there sufficient evidence on such questions of fact to sustain the verdict of the jury in favor of Appellee?

C. EVIDENCE LEGALLY SUFFICIENT TO ESTABLISH PERMISSION.

The term “permission” in an omnibus clause of an automobile policy includes “implied” permission, which may be inferred by the jury from a course of conduct or a relationship and does not require affirmative action by the named insured,

- Andrews v. Commercial Casualty Ins. Co.* (1935), 128 Neb. 496, 259 N.W. 653;
Maryland Casualty Co. v. Ronan (1930, C.C.A. 2d Vt.), 37 F. (2d) 449, 72 A.L.R. 1360;
Georgia Casualty Co. v. Waldman (1931, C.C.A. 5th Ala.), 53 F. (2d) 24;
Aetna L. Ins. Co. v. Dunn (1936, C.C.A. 3d N.J.), 84 F. (2d) 752;
Glens Falls Indem. Co. v. Zurn (1937, C.C.A. 7th Wis.), 87 F. (2d) 988;
American Casualty Co. v. Windham (1939, C.C.A. 5th Ga.), 107 F. (2d) 88 (affg (1939, D.C.), 26 F. Supp. 261, and cert. den. (1940), 309 U.S. 674, 84 L. Ed. 1019, 60 S. Ct. 714);
Vezolles v. Home Indem. Co. (1941, D.C. Ky.), 38 F. Supp. 455 (affd. (1942, C.C.A. 6th), 128 F. (2d) 257).

The omnibus clause is at least as broad as the owner's liability for permissive use under California Vehicle Code, Section 402; see, *Bayless v. Mull* (1942), 50 C.A. (2d) 66, 122 P. (2d) 608; *Burgess v. Cahill* (1945), 26 C. (2d) 320, 158 P. (2d) 393; *Blank v. Coffin* (1942), 20 C. (2d) 457, 126 P. (2d) 868; *Souza v. Corti* (1943), 22 C. (2d) 454, 139 P. (2d) 645.

Prior knowledge of the owner of the intended use of his automobile by a permittee is not a necessary element of implied permission,

- Burgess v. Cahill* (1945), 26 C. (2d) 320, 323, 158 P. (2d) 393;
Scheff v. Roberts (Mar., 1950), 35 A.C. 10, 15, 215 P. (2d) 925.

Regardless of the lack of such knowledge, the relationship of the parties, their conduct and the circumstances surrounding the use of the automobile raise an inference of implied permission, *Scheff v. Roberts*, supra.

1. INFERENCE OF IMPLIED PERMISSION.

a. Mehlin's were husband and wife.

On February 12, 1941, Mr. and Mrs. Mehlin intermarried and at all times thereafter were husband and wife (T. 135). The automobile was purchased for the sum of \$350.00, which came from Mr. Mehlin's Army mustering out pay, money Mrs. Mehlin had in the bank, which she received from Mr. Mehlin while he was in the Army* and the balance was paid by Mr. Mehlin (T. 133, 136).

b. Mrs. Mehlin had general unrestricted right to use automobile.

After the automobile was purchased in January of 1946, Mrs. Mehlin learned to drive it and obtained a driver's license to operate it (T. 148). Mr. Mehlin left the automobile at their home for her use two or three days a week, and he authorized her to use it for "what business she had * * *" (T. 137), and Mrs. Mehlin could use the car at any time she wanted it (T. 149).

A reading of the testimony of Mr. and Mrs. Mehlin shows that Mr. Mehlin did not require Mrs. Mehlin to request permission from him to use the car before she used it, and he did not restrict the purpose for, the

*The record does not disclose whether it was a family allotment from the United States.

length of time or place in which Mrs. Mehlin could use the car (T. 126-151).

It is, therefore, clear that Mrs. Mehlin was given the general use of this car by her husband and, as pointed out in *Stewart v. Norsigian* (1944), 64 C. A. (2d) 540, 149 P. (2d) 46, such family relationship will raise an inference of permission. Before the trial, in arguing the admissibility of the chattel mortgage and the arrest of Mrs. Mehlin, Insurer admitted that such an inference arose from the evidence offered by Appellee (T. 114, 252). Such mortgage and arrest are discussed at page 33 hereof.

c. Claggett had express permission from Mrs. Mehlin.

At page 24 of its opening brief, Insurer has conceded "that Mrs. Mehlin gave permission to Claggett to use the car."

California has expressly held that the parent of a son is responsible as the owner of a car when a permittee of his son was driving, even though the parent gave specific instruction that such a permittee should not drive the car.

Souza v. Corti (1943), 22 C. (2d) 454, 139 P. (2d) 645;

Haggard v. Frick (1935), 6 C.A. (2d) 392, 44 P. (2d) 447.

One reason for refusing to allow such restriction to negative liability is that "the owner can avoid liability by refusing to permit the use of his motor car by another or procure insurance to protect him, he should not be permitted to avoid the consequences of the operator's negligence and escape liability therefor by

secret restrictions limiting the right to use the motor vehicle,"

Souza v. Corti (1943), 22 C. (2d) 454, 460, 139 P. (2d) 645;

Bayless v. Mull (1942), 50 C. A. (2d) 66, 75, 122 P. (2d) 608.

2. ADMISSIONS OF COVERAGE AND PERMISSION BY INSURER.

a. By claims adjusters Dennis and Gripenstraw.

On November 10, 1947, Louis V. Crowley, one of the attorneys for Appellee, wrote Insurer stating that they represented Appellee and would discuss settlement without the delay and expense of litigation (T. 83). On November 14, 1947, Meyers acknowledged receipt of such letter and replied that Insurer was unable to find any record of any policy issued to Claggett (T. 84).

On December 3, 1947, Dennis telephoned Appellee's attorneys and informed them that Insurer did have insurance coverage of this automobile, and that its previous report to the contrary was in error (T. 85).

On December 27, 1947, at Richmond, California, summons was personally served upon Claggett in said action (T. 178). Thereafter, at Insurer's instruction, Claggett caused the copy of the summons and complaint served on him to be delivered to Insurer (T. 176) for its defense.

Upon receipt of such summons and complaint, Insurer's claim superintendent, Meyers, instructed its claims adjuster, Gripenstraw, to contact Appellee's attorneys. On December 31, 1947, Gripenstraw called in person at the office of said attorneys and met Castro. In a conversation with Castro, Gripenstraw stated

that Insurer had a policy covering this automobile and would like to settle the case. When an inquiry was made concerning the limits of such policy, Gripenstraw stated the rules of Insurer prohibited the giving of such information but indicated the limits were probably \$10,000.00. When Castro informed him that Appellee was entitled to the policy limits, Gripenstraw replied Insurer would not pay such amount, as it had a defense. When Castro stated the issues in the case were negligence and permissive use, and inquired whether there was a question about permission, Gripenstraw replied: "No, there isn't. We are satisfied that Mrs. Mehlin had the permission to bring the automobile out here and that Mr. Claggett had her permission to use it." Before he left the office, Gripenstraw offered on behalf of Insurer the sum of \$7,500.00 in settlement of the case (T. 85-87). Appellee was advised of such settlement offer by letter (T. 87).

b. By Insurer's attorneys.

Insurer's attorneys prepared an answer to the complaint in such wrongful death action on behalf of Claggett. On the 17th day of February, 1948, one of said attorneys, Mr. Dana, the attorney in charge of the defense of such action, verified such answer on behalf of Claggett and, thereafter, filed it in such death action. The answer expressly admitted that Insurer's named insured, Mr. Mehlin, was the owner of this automobile and Claggett was driving it with his permission (T. 90-91). It should not need any citation of authority to support the rule that such an admission establishes a *prima facie* case of permissive use.

Insurer's contention that since this answer was superseded by an amended answer, it cannot be used as an admission is without merit.

A reading of the cases cited by Insurer (*Kambourian v. Gray* (1947), 81 C. A. (2d) 783, 185 P. (2d) 27; *Gajanich v. Gregory* (1931), 116 Cal. App. 622, 3 P. (2d) 389; *Weissbaum v. Eibeshutz* (1930), 211 Cal. 170, 294 Pac. 396) and the proof concerning such original answer (T. 90-91) demonstrates the fallacy of Insurer's contention. In each of said cases, such superseded pleading was offered and admitted, only, for impeachment purposes, while in this action such original answer was in evidence for all purposes within the issues of this action. Where there was no objection to or limitation of the offer of proof, California has expressly held that such superseded answer is an admission of the fact stated in such answer,

Coward v. Clanton (1889), 79 Cal. 23, 28, 21 Pac. 359 (cited with approval in *Tieman v. Red Top Cab Co.* (1931), 117 Cal. App. 40, 45, 3 P. (2d) 381, and *Dolinar v. Pedone* (1944), 63 C. A. (2d) 169, 146 P. (2d) 237).

Further, the uniform California rule is settled that where objectionable evidence, or evidence admissible for a limited purpose, is admitted without objection or limitation, it is competent evidence and must be given full weight in determining the sufficiency of the evidence,

Holzer v. Read (1932), 216 Cal. 119, 123, 13 P. (2d) 697,

the Court said:

“While opposing counsel may move to strike it out if for any reason it is improper to be admitted, so long as it stands it is competent evidence to be considered. Where, as here, the insufficiency of the evidence is the question to be determined, full weight must be given to evidence which would have been excluded had objection been made, and even to evidence erroneously admitted against objection provided it be relevant. Evidence may tend to prove the issues and yet be incompetent. (Hayne on New Trial and Appeal, sec. 98.)

In *Goode v. Smith* (1859), 13 Cal. 81, one of the questions involved was as to the ownership of land. A witness had been permitted to testify upon the subject. In discussing this evidence, the court held that while it was not the best mode of proving the fact, nevertheless no objection having been taken to its admissibility, it was proper for the purpose.”

Riverside Rancho Corp. v. Cowan (1948), 88

C. A. (2d) 197, 207, 198 P. (2d) 526;

Hatfield v. Levy Bros. (1941), 18 C. (2d) 798, 808, 117 P. (2d) 841;

Ingraham v. Smith (1948), 83 C. A. (2d) 807, 189 P. (2d) 721—proof of agency.

- i. Affidavit of Dana inadmissible; if admissible, it supports inference Insurer's file showed Clagett had permission of named insured.

In determining the propriety of Insurer's motions, it was the duty of the trial Court to disregard such affidavit, as evidence for the defense must be disregarded,

Nash v. Wright (1947), 82 C. A. (2d) 467, 470, 186 P. (2d) 686.

Further, under Rule 43(a) of the Federal Rules of Civil Procedure, the trial Court was entitled to apply the California rule on the admissibility of such affidavits, unless the Federal rule of evidence would make the affidavit admissible. In California, an affidavit is not admissible unless its use is authorized by Section 2009 of the Code of Civil Procedure of California or other code sections,

Moon v. Moon (1944), 62 C. A. (2d) 185, 188, 144 P. (2d) 596;

Oil Tool Exchange, Inc. v. Hasson (1935), 4 C. A. (2d) 544, 41 P. (2d) 211;

Reidy v. Collins (1933), 134 Cal. App. 713, 722, 26 P. (2d) 712;

Lacrabere v. Wise (1904), 141 Cal. 554, 75 Pac. 185;

1 *Cal. Jur.* 677, et seq.

And the fact that the affiant cannot be produced does not make his affidavit admissible,

People v. Barnett (1929), 99 Cal. App. 409, 416, 278 Pac. 885.

Over the objection of Appellee that such affidavit was inadmissible as hearsay evidence, the trial Court admitted the affidavit on the issue of estoppel (T. 100, 251), so even under the trial Court's ruling it is not to be considered on the issue of permission. However, it was error to admit such affidavit for any purpose. It is replete with legal conclusions and opinions of the affiant and it should be disregarded by this Court. Further, while the affidavit expressly states "*that affiant prepared the answer upon information con-*

tained in the file and for that reason admitted that the automobile was being driven with the consent of the defendant Wilbur M. Mehlin; . . .”, it does not state that such file did not contain any information that such automobile was not being used with the permission of Mr. Mehlin. Therefore, an inference arises from such affidavit that Dana’s file contained some information that Mr. Mehlin consented to Claggett’s use of this automobile; otherwise, Dana would not have made such admission.

3. PRESUMPTIONS ESTABLISHED PERMISSION.

It is well established under California law that Appellee’s burden of proof was aided by the statutory presumptions that a person is innocent of wrong and the law has been obeyed, i.e., of using property of another with the latter’s consent,

Code of Civil Procedure, Sec. 1963 (1) and (33);

Prickett v. Whapples (1935), 10 C. A. (2d) 701, 52 P. (2d) 972;

Lanfried v. Bosworth (1941), 45 C. A. (2d) 408, 114 P. (2d) 406;

Nash v. Wright (1947), 82 C. A. (2d) 467, 473, 186 P. (2d) 686;

Souza v. Corti (1943), 22 C. (2d) 454, 460, 139 P. (2d) 645;

Vaughn v. Jonas (1948), 31 C. (2d) 586, 601, 191 P. (2d) 432.

From the family relationship of husband and wife between Mr. and Mrs. Mehlin, Mrs. Mehlin’s unrestricted general right to use the automobile, Mrs.

Mehlin's express consent to Claggett for its use, the admissions by Insurer's agents and attorney of Claggett's permission to use the automobile, the presumptions in favor of Claggett's lawful use of it, and the inferences reasonably deducible from all of such facts and presumptions, the jury was justified in its determination that Claggett had implied permission to use the automobile.

**4. APPELLEE'S PROOF NOT DISPELLED BY
INSURER'S EVIDENCE.**

In determining whether motions for a directed verdict and for judgment *non obstante veredicto* should be granted, the trial Court cannot weigh the evidence offered by Insurer or determine the credibility of the witness, but can only examine the evidence to determine whether there was evidence of sufficient substance to support a verdict for Appellee, and must consider only evidence favorable to plaintiff in making its determination.

Estate of Flood (1933), 217 Cal. 763, 768-9, 21 P. (2d) 579;

Gish v. Los Angeles Ry. Corp. (1939), 13 C. (2d) 570, 90 P. (2d) 792;

Phillips v. Southern Pacific Co. (1936), 14 C. A. (2d) 454, 58 P. (2d) 688.

Despite such well established rule, Insurer contends that its evidence showed as a matter of law that Claggett did not have permission to use this car and that such evidence dispelled any inference of permission, citing, *Engstrom v. Auburn Auto. Sales Corp.* (1938), 11 C. (2d) 64, 77 P. (2d) 1059; *Kimbles v. Kelly*

(1935), 6 C. A. (2d) 91, 43 P. (2d) 871; *Montanya v. Brown* (1939), 31 C. A. (2d) 642 at 645, 88 P. (2d) 745, and *Myers v. McMaken* (1937), 133 Neb. 524, 276 N.W. 167; *Harrell v. People's City Mission* (1936), 131 Neb. 138, 267 N.W. 344 (citing the California cases of *Hanchett v. Wisely* (1930), 107 Cal. App. 230, 290 Pac. 311; *Philleo v. Hefnider* (1942), 140 Neb. 808, 2 N.W. (2d) 31; *Witthauer v. Paxton-Mitchell Co., et al.* (1945), 146 Neb. 436, 19 N.W. (2d) 865).

In explaining the *Engstrom* case, *supra*, California has expressly held that on a motion for directed verdict the presumptions or inferences raised by a plaintiff's circumstantial evidence are not dispelled by clear, positive and uncontradicted evidence of the defendant, but such presumptions or inferences remain as evidence in the case sufficient to support a judgment for plaintiff, except in the rare case when there is produced by the plaintiff himself positive and direct evidence contrary to the presumptions or inferences raised by plaintiff's own proof,

Nash v. Wright (1947), 82 C. A. (2d) 467, 470-473, 186 P. (2d) 686;

Chakmakjian v. Lowe (1949), 33 C. (2d) 308, 313, 201 P. (2d) 801.

Further, a review of Insurer's evidence shows that it is not clear, positive and uncontradicted evidence not open to doubt. As stated in *Blank v. Coffin* (1942), 20 C. (2d) 457, 461, 126 P. (2d) 868:

"Usually, the opposing party introduces evidence as to the nonexistence of the fact in issue,

and the jury must then determine the existence or nonexistence of the fact from all the evidence before it. If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law. (*Engstrom v. Auburn Auto Sales Corp.*, 11 Cal. (2d) 64 (77 P. (2d) 1059); *Crouch v. Gilmore Oil Co.*, 5 Cal. (2d) 330 (54 P. (2d) 709); *Maupin v. Solomon*, 41 Cal. App. 323 (183 Pac. 198).) The jury, however, is the sole judge of the credibility of the witnesses (Cal. Code Civ. Proc., sec. 1847; see cases cited in 27 Cal. Jur. 182, sec. 156) and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. (*Hinkle v. Southern Pacific Co.*, 12 Cal. (2d) 691 (87 P. (2d) 349); *Barsha v. Metro-Goldwin-Mayer*, 32 Cal. App. (2d) 556 (90 P. (2d) 371); *Burke v. Bank of America etc. Assn.*, 34 Cal. App. (2d) 594 (94 P. (2d) 58); *People v. La Fleur*, 42 Cal. App. (2d) 50 (108 P. (2d) 99). See cases collected in 27 Cal. Jur. 184, sec. 156; 8 A.L.R. 796.) In most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference. (*Bushnell v. Tashiro*, *supra*; *Market Street Ry. Co. v. George*, 116 Cal. App. 572, 576 (3 P. (2d) 41); *Day v. General Petroleum Corp.*, 32 Cal. App. (2d) 220 (89 P. (2d) 718).)

“There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: ‘A witness is presumed to speak the truth. This presumption,

however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.' Section 2061(3) of the Code of Civil Procedure provides: 'That a witness false in one part of his testimony is to be distrusted in others.' In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case. (See cases collected in 27 Cal. Jur. 180, sec. 154.)''

The application of such well settled rules to Insurer's evidence demonstrates the trial Court would have erred had it granted such motions:

The facts that there was a family relationship of husband and wife between Mr. and Mrs. Mehlin, that Mrs. Mehlin had the unrestricted general use of the automobile, that she gave permission to Claggett to use it, and that Insurer, through its agents and attorneys, admitted that Claggett had the permission of its named insured to use the automobile, and the presumptions in favor of Claggett's lawful use of it were sufficient to support an inference that the car was being driven with the permission of Insurer's named insured within the meaning of its omnibus clause. When Insurer offered evidence contrary to such inference in the testimony of Louis Gripenstraw, John Dennis, William Hunt, Mr. Dana's affidavit and Mr. and Mrs. Mehlin, the jury was entitled to disbelieve their testimony on several grounds: Gripenstraw, Dennis, Hunt and Dana was each an employee of Insurer and each had an interest in the outcome of

this case since each would naturally desire to remain in the good graces of Insurer; further, Gripenstraw and Dana each made an express admission of such permissive use and, in his affidavit, Dana acknowledged that his admission was based upon the contents of his file. Dana's affidavit does not assert that his admission was inadvertent or a mistake and does not assert that the file did not disclose information which warranted his admission that Claggett had the permission of the named insured. As to Mr. and Mrs. Mehlin, the jury knew that each of them was financially interested in defeating liability. It further knew that Mr. and Mrs. Mehlin did not raise any question about Claggett's permission to drive the car until after Insurer informed Mr. Mehlin, some six months after the accident, that he had a "possible personal liability"; also, it knew that Mr. Mehlin did not pay Ginsberg & Ginsberg to write the letter of April 19, 1948, from which Insurer claims it first learned of a possible defense of lack of permission (T. 130-140). Such reasons constitute a rational ground for rejecting their testimony, *Hicks v. Reis* (1943), 21 C. (2d) 654 at 661, 134 P. (2d) 788, and *Blank v. Coffin, supra*. Further, since the criminal action against Mrs. Mehlin for removing a mortgaged car from Nebraska without the mortgagee's permission was dismissed by the county attorney for insufficient evidence (T. 119-120, 135) and no criminal charge was placed against Claggett, the jury could infer that Mrs. Mehlin had permission to drive the car to California and Claggett had permission of its owner, the named insured, to use it in California.

- a. Insurer's citations that inferences or presumptions of permission vanish not in point.

At page 27 of its opening brief, Insurer has stated the following Nebraska cases to the effect that any inferences or presumption of permission vanishes in the face of positive evidence:

Myers v. McMaken (1937), 133 Neb. 524, 276 N.W. 167;

Harrell v. People's City Mission (1936), 131 Neb. 138, 267 N.W. 344 (citing the California case of *Hanchett v. Wiseley* (1930), 107 Cal. App. 230, 290 Pac. 311);

Philleo v. Hefnider (1942), 140 Neb. 808, 2 N.W. (2d) 31;

Witthauer v. Paxton-Mitchell Co., et al. (1945), 146 Neb. 436, 19 N.W. (2d) 865.

Each of such cases is distinguishable from the case at bar because in each of them the issue was whether the driver of the vehicle was acting in the scope of the defendant's employment at the time of the accident, and the record was "devoid of any proof" that the driver was acting in the scope of his employment; see, *Myers v. McMaken* (1937), 133 Neb. 524, 276 N.W. 167.

Where the record is devoid of any proof of an issue, there can be no question of dispelling an inference to support such issue, *Estate of Flood* (1933), 217 Cal. 763, 768, 21 P. (2d) 579.

The California authorities (and no contrary Nebraska authorities have been found) hold that the

evidence may be adequate to establish permissive use and still be inadequate to establish agency.

Montanya v. Brown (1939), 31 C.A. (2d) 642, at 645, 88 P. (2d) 745.

The elements of permissive use and the elements of agency are manifestly different. The Nebraska cases on the issue of agency are, therefore, not in point.

Further, as already stated, the California and not the Nebraska law governs the issue of the sufficiency of the evidence in the case at bar.

b. Insurer's citations that only a permittee of named insured is covered not in point.

At pages 20 and 26 of its opening brief, Insurer has cited several cases allegedly holding that only a permittee of the named insured is covered under an omnibus clause. All of these cases are distinguishable from the case at bar:

i. California cases.

In *Kimbles v. Kelly* (1935), 6 C.A. (2d) 91, 43 P. (2d) 871, two weeks after his discharge, a discharged employee obtained his employer's car from a garage under false pretenses. There was no evidence as to how the driver received possession of the car. The case holds simply that a showing of mere ownership, without more, does not raise an inference of permissive use. A family relationship, on the other hand, does raise an inference of permissive use in a third person who received permission from a member of the family other than the named insured.

Souza v. Corti (1943), 22 C. (2d) 454, 139 P. (2d) 645.

In *Montanya v. Brown* (1939), 31 C.A. (2d) 642, 88 P. (2d) 745, where a partner's sister-in-law was driving a co-partnership car for pleasure, the Court held that while the evidence showed permissive use, there was no evidence of agency. See, *Bayless v. Mull* (1942), 50 C.A. (2d) 66, 73, 122 P. (2d) 608 and *Stewart v. Norsigian* (1944), 64 C.A. (2d) 540, 550, 149 P. (2d) 46, which have distinguished *Montanya v. Brown*, *supra*.

Engstrom v. Auburn Auto. Sales Corp. (1938), 11 C. (2d) 64, 77 P. (2d) 1059, involved the use of a car by its prospective purchaser for personal purposes, when he only had permission to show it to his family and return it to the seller. The Court found that the evidence was uncontradicted on the limited permission given. The case has been distinguished and its application restricted in *Nash v. Wright* (1947), 82 C.A. (2d) 467, 470, 186 P. (2d) 686; *Chakmakjian v. Lowe* (1949), 33 C. (2d) 308, 313, 201 P. (2d) 801; *Burgess v. Cahill* (1945), 26 C. (2d) 320, 324, 326, 158 P. (2d) 393; *Blank v. Coffin* (1942), 20 C. (2d) 457, 126 P. (2d) 868; *Hicks v. Reis* (1943), 21 C. (2d) 654, 661, 134 P. (2d) 788; and *Reed v. Cortez* (1948), 88 C.A. (2d) 416, 419, 198 P. (2d) 911.

ii. Cases where permissive use was not in issue.

In *Wigington v. Ocean Acc. & Guarantee Co.* (1930), 120 Neb. 162, 231 N.W. 770, the automobile policy was issued to a corporation, which was the named insured under the policy; the automobile was not owned by the corporation but was owned by the wife of the vice-president of the corporation; the wife allowed a third person to drive her car on his per-

sonal business. The Court held that the policy covered only the property of the corporation and property being used in the business of the corporation during the time of such use. It is evident that (1) the wife who owned the car and gave permission was not the wife of the named insured, and (2) permissive use by the named insured (as distinguished from use in the business of the named insured during the time of such use) was not involved.

iii. Federal Court cases where the evidence was uncontradicted.

In *Columbia Cas. Co. v. Lyle* (C.C.A. 5th, 1936), 81 F. (2d) 281, a farm caretaker, contrary to strict instruction from his owner, permitted a farm hand to drive the truck off the farm, and the farm hand used it contrary to the caretaker's instructions. The evidence as to non-permission was uncontradicted.

In *U. S. F. & G. Co. v. Mann* (C.C.A. 4th, 1934), 73 F. (2d) 465, a municipal employee, who had a municipal car for municipal business, allowed his son to use it for pleasure. The evidence was uncontradicted that use of the car was limited to official municipal business only. This case simply affirms the findings of the trial Court in favor of the defendant. It does not involve the issue of taking the case away from the jury.

iv. Federal Court cases where the trier of fact decided in favor of the defendant.

In *Trotter v. Union Ind. Co.* (C.C.A. 9th, 1929), 35 F. (2d) 104, a car salesman, who was given permission to use a friend's car in the sale of automobiles, let a stranger use the car for pleasure. This case

simply affirms the findings of the trial Court in favor of the defendant. It does not involve the issue of taking the case away from the jury.

In *Fredericksen v. Employers* (C.C.A. 9th, 1928), 26 F. (2d) 76, the owner let a friend use his car to attend a funeral and after the funeral such friend used the car on a drunken joy ride. The evidence of the limited purpose of the permission was uncontradicted. This case simply affirms the findings of the trial Court in favor of the defendant. It does not involve the issue of taking the case away from the jury.

All of the foregoing cases, however, were decided prior to *Erie Railroad Co. v. Tompkins* (1938), 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

D. EVIDENCE LEGALLY SUFFICIENT TO ESTABLISH WAIVER AND ESTOPPEL.

1. APPELLEE IS BENEFICIARY OF THIS POLICY.

Under "Insurance Agreements," Coverage A(1) of its policy, Insurer agreed to "pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, because of bodily injury, * * * and death at any time resulting therefrom sustained by any person or persons caused by accident and arising out of the ownership, operation, maintenance or use of" this automobile (T. 30). Such sum is payable to the injured persons, the heirs of the decedent, or to the insured, if he pays such person or heirs; and Condition 5(b) of its policy gives them a

right of action against Insurer for such sum, as follows:

“(b) With respect to Coverage A no action shall lie against the Company until the amount of the insured’s obligation to pay shall have been finally determined either by final judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy” (T. 41).

Under the law of California, where the right to bring such an action was conferred by statute, the injured third party has been held to be a beneficiary of such a policy.

Bachman v. Independence Indemnity Co. (1931), 112 Cal. App. 465, at 483, 297 Pac. 110;

Panhans v. Associated Indemnity Corp. (1935), 8 C.A. (2d) 532, at 535, 47 P. (2d) 791, approves similar language in *Malmgren v. Southwestern A. Ins. Co.* (1927), 201 Cal. 29, 255 Pac. 512.

Since Insurer, by express provision in its Condition 5(b), gave Appellee a right of action against it, Appellee is a beneficiary of its policy.

While it is true that in the absence of waiver or estoppel on the part of the Insurer, an insured or the injured third party is bound by the terms of the insurance policy, California has rejected the narrow

language of *Royal Indemnity Co. v. Watson* (C.C.A. 5th, 1932), 61 F. (2d) 614 and *Home Indemnity Co. v. Standard Acc. Ins. Co.* (C.C.A. 9th, 1948), 167 F. (2d) 919, to the effect that an insurance policy "was not designed for the protection of strangers." See, *Souza v. Corti* (1943), 22 C. (2d) 454, 460, 139 P. (2d) 645; *Bayless v. Mull* (1942), 50 C.A. (2d) 66, 122 P. (2d) 608, which point out that the basis of permissive use liability is "to curb the growing menace of death and injury" from the operation of an automobile. See, *Burgess v. Cahill* (1945), 26 C. (2d) 320, 323, 158 P. (2d) 393.

Should not the public be entitled to the benefits and protection of the omnibus clause of an insurance policy, when an insurance company has been paid to assume the liability for such negligent use of an automobile?

2. WAIVER AND ESTOPPEL DEFINED AND DISTINGUISHED.

In its opening brief, Insurer has failed to distinguish between the terms "waiver" and "estoppel" and treated them as synonymous. Such terms are not synonymous. The distinguishing elements of each term have been described in 56 Am. Jur. 103, which is quoted in part as follows:

"* * * As already seen, a waiver is an intentional relinquishment, while the indispensable elements of an estoppel are ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and an innocent and deleterious change of position in reliance on that representation. Furthermore, an estoppel consists of a preclusion which in law prevents a party from alleging or denying a fact in conse-

quence of his own previous act, averment, or denial. * * * Among the differences between estoppel and waiver are that in an estoppel the intention to relinquish a right does not need to be present, while a choice between the relinquishment and the enforcement of a right is essential to waiver; and that waiver depends upon what one himself intends to do regardless of the attitude assumed by the other party, whereas estoppel depends rather upon what the other party has done. Waiver does not necessarily imply that the other party has been misled to his prejudice, but an estoppel always involves this element. Estoppel results from an act which operates to the injury of the other party, while waiver may even affect him beneficially. Estoppel frequently carries the implication of fraud, but waiver never does. Waiver involves both knowledge and intention; an estoppel may arise where there is no intent to mislead. Waiver involves the act and conduct of only one of the parties, while estoppel involves the conduct of both. Waiver presupposes a full knowledge of a right existing and an intentional surrender or relinquishment of that right. It contemplates something done **designedly or knowingly**, which modifies or changes **existing** rights or varies or changes the terms of provisions of the contract."

In accord are:

Bastanchury v. Times-Mirror Co. (1945), 68 C.A. (2d) 217, 240, 156 P. (2d) 488;

Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N.W. 779.

The elements of waiver have been stated as follows:

“* * * to constitute a waiver there must be an existing right, benefit or advantage, a knowledge, actual or constructive, of its existence; and an actual intention to relinquish it or such conduct as warrants an inference of the relinquishment.”

25 *Cal. Jur.* 927.

A similar definition of waiver set forth in 27 R.C.L. 908 has been quoted and approved in

Craig v. White (1921), 187 Cal. 489, 202 Pac. 648;

First Nat'l Bank v. Davis (1932), 123 Neb. 304, 242 N.W. 655;

Cutler v. Roberts (1878), 7 Neb. 4, 29 Am. Reports 371.

a. Constructive knowledge is sufficient for waiver.

Both California and Nebraska follow the commonly accepted rule that “every person, who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.

Civil Code of California, Sec. 19;

Northwestern P. C. Co. v. Atlantic P. C. Co. (1917), 174 Cal. 308, 313, 163 Pac. 47;

Shapiro v. Equitable Life Assur. Soc. (1946), 76 C.A. (2d) 75, 86, 172 P. (2d) 725.

In *Baxter v. National Mortgage Loan Co.* (1935), 128 Neb. 537, 259 N.W. 630, at 640, it was stated, as follows:

“As heretofore shown, the information actually communicated to Baxter, as early as December

10, 1924, was ample to put him on inquiry, and there can be no question that to Baxter the means of knowledge was at hand. The rule is: 'Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This, in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts'. 20 R.C.L. 346, par. 7."

i. Insurer's citations are not in point.

In its opening brief, at pages 27-31, Insurer has cited several California and Nebraska cases to the effect that an insurer must have knowledge of the facts before a waiver occurs. A reading of each of those cases shows that not one of them holds that constructive knowledge is not a proper basis for a waiver. The following cases, cited by Insurer, deal with estoppel and are distinguishable from the case at bar upon the grounds that in each of them the insured made a positive misrepresentation of a material fact to his insurer, which was misled by such misrepresentation, and the Courts held that one who has committed a fraud cannot claim the benefit of an estoppel.

Mirich v. Underwriters at Lloyd's, London (1944), 64 C.A. (2d) 522, at 530, 149 P. (2d) 19, involving a malpractice policy, the insured definitely misrepresented to insurer whether he had been sued for malpractice; *Cohen v. Metropolitan Life Ins. Co.* (1939), 32 C.A. (2d) 337, 89 P. (2d) 732, where the

insured specifically represented to his insurer that he contracted the disease after and not before the issuance of its policy;

George v. Guarantee Mut. Life Co. (1944), 144 Neb. 285, 13 N.W. (2d) 176, insured falsely and fraudulently misrepresented his physical condition to insurer.

Also, in *Home Indemnity Co. v. Standard Acc. Ins. Co.* (C.C.A. 9th, 1948), 167 F. (2d) 919, the insured gave his insurer five inconsistent and varying versions of his accident.

The following cases are distinguishable upon the grounds that there was no evidence of waiver or estoppel in that the Insurer either had no knowledge of alleged breach; or that as soon as Insurer obtained knowledge, it immediately disclaimed liability or took a reservation of its rights for its future handling of the defense; or after such knowledge it did nothing to affect the rights of the parties.

McDaniels v. General Ins. Co. (1934), 1 C.A. (2d) 454, 461, 46 P. (2d) 829;

Wigington v. Ocean Acc. & Guarantee Co. (1930), 120 Neb. 162, 231 N.W. 770;

Commercial Standard Ins. Co. v. Robertson (C.C.A. 6th, 1947), 159 F. (2d) 405;

Hamilton v. Home Fire Ins. Co. (1894), 42 Neb. 883, 61 N.W. 93;

Royal Indemnity Co. v. Watson (C.C.A. 5th, 1932), 61 F. (2d) 614;

Oak Creek Bank v. Helmer (1899), 59 Neb. 176, 80 N.W. 891,

or that at the time Insurer acted the plaintiff knew Insurer had already rejected liability,

Klanecky v. Woodmen of World (1934), 126 Neb. 809, 254 N.W. 577;

Sawyer v. Sovereign Company (1920), 105 Neb. 395, 181 N.W. 191;

Nat'l Aid Asso. v. Brachter (1902), 65 Neb. 378, 91 N.W. 379, 93 N.W. 1122.

b. Waiver implied from conduct of insurer.

Nebraska has repeatedly held that *if an insurer with knowledge or notice of facts entitling it to assert a policy defense, if it chose, does any act thereafter inconsistent with its reliance upon such defense, and the insured thereby is induced to act in the belief that such policy is a valid and subsisting contract, a waiver occurs,*

Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N.W. 779, where it is stated:

“The defendant asked the trial court to instruct the jury as follows: ‘No alleged waiver of any condition or provision of the policy would prevent the defendant from insisting it was void, unless the party insured acted to his own prejudice upon the faith of such waiver’—which was refused, and this ruling, it is insisted, was erroneous. It is probably true that the request, rightly understood, correctly states the law; but it may be well doubted whether, if given in this case without explanation, it might not have been misleading to the jury. To constitute a waiver of the provisions of a policy of insurance providing for forfeiture, the acts relied upon need not be attended with such equitable circumstances as would be required to constitute an estoppel. It is

not necessary that the party be induced by the acts in question to in any manner change his position with reference to the subject of the negotiation, even when the acts are done after the forfeiture occurs. *Billings v. Insurance Co.*, 34 Neb. 502, 52 N.W. 397; *Hollis v. Insurance Co.*, 65 Iowa 454, 21 N.W. 774. The instructions given were quite exhaustive, and in the *fifteenth instruction given by the court on its own motion the jury was told that if the defendant, with full knowledge of the facts, neglected to declare its intention of insisting on the forfeiture, but by its acts recognized and treated the policy as a valid and subsisting contract between it and the plaintiffs, and induced them to act in that belief, it will be deemed to have waived such forfeiture.* Under the facts as disclosed by the evidence in this case, the plaintiffs negotiated with the defendant during six months; and, without doubt, if the jury believed from the evidence that during these negotiations the defendant induced the plaintiffs to act in the belief that the policy was valid, by recognizing and so treating the policy, then it must follow that the provisions of the policy relied upon must be considered as waived by the company. We think that this fifteenth instruction correctly stated the law to the jury, and that it contained every essential element that the defendant was entitled to have embraced therein; and the failure of the court to state the converse of the proposition contained in this instruction is not, in the condition of the evidence in this case, reversible error."

German Mutual Fire Ins. Co. v. Palmer (1902), 3 Neb. 688, 92 N.W. 624;

Hunt v. State Ins. Co. (1902), 66 Neb. 121, 92 N.W. 921;

Lydick v. Gill (1903), 68 Neb. 273, 94 N. W. 109.

And, in California, such waiver may be shown by the conduct of the insurer, i.e., where its acts or omissions, according to their natural import, are so inconsistent with the intent to enforce a right as to induce a reasonable belief that it has been waived.

Bastanchury v. Times-Mirror Co. (1945), 68 C.A. (2d) 217, 240, 156 P. (2d) 488;

Spiegelman v. Metropolitan L. Ins. Co. (1937), 21 C.A. (2d) 299, 301, 68 P. (2d) 1006;

Erskine v. Upham (1942), 56 C.A. (2d) 235, 248, 132 P. (2d) 219;

Medico-Dental Etc. Co. v. Horton & Converse (1942), 21 C. (2d) 411, 432, 132 P. (2d) 457.

c. Elements of estoppel not required for waiver.

An effective waiver does not require a new agreement or estoppel,

Home Fire Ins. Co. v. Kuhlman (1899), 58 Neb. 488, 78 N.W. 936, where it is stated:

“The contention that a waiver must have the elements of an estoppel in cases of this kind cannot be sustained. ‘It is,’ says Sutherland, J., in *People v. President, etc. of Manhattan Co.*, 9 Wend. 381, ‘a technical doctrine, introduced and applied by courts for the purpose of defeating forfeitures.’ In *Titus v. Insurance Co.*, 81 N.Y. 410, it was held that *an effective waiver need not be based on either a new agreement or an estoppel*. Substantially the same holding was made in *Hollis v. Insurance Co.*, 65 Iowa 454, 21 N.W. 774; and such is now the settled doctrine of this court. *Billings v. Insurance Co.*, 34 Neb. 502, 52 N.W. 397; *Eagle Fire Co. of New York v. Globe*

d. Change of position or prejudice not required for waiver.

Under Nebraska law, change of position by or prejudice to Appellee is not necessary to constitute a waiver by Insurer. Such waiver occurred when Appellee was induced to act in the belief that Insurer was treating its policy as a valid and subsisting contract between them,

Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N.W. 779;

Further, even when the acts are done after the condition is breached, a waiver arises even though the party relying upon the acts of the Insurer does not change her position in any manner with reference to the subject of the negotiation,

Hartford Fire Ins. Co. v. Landfare, supra;
Home Fire Ins. Co. v. Kuhlman, supra.

3. CONSTRUCTIVE KNOWLEDGE OF INSURER SHOWN BY EVIDENCE.

Whether Insurer had notice of circumstances sufficient to put a prudent man upon inquiry as to the facts of "permission" and of the place where the automobile was "principally garaged and used", and whether by prosecuting such inquiry Insurer might have learned of such facts, are questions of fact for the jury,

Northwestern P. C. Co. v. Atlantic P. C. Co. (1917), 174 Cal. 308, 313, 163 Pac. 47.

There was sufficient evidence from which the jury could and did find Insurer had such duty of inquiry and could have learned such facts as it now claims entitles it to a defense.

First, Insurer is presumed to know the provisions of its own policy and that in the absence of waiver or estoppel on its part, Insurer's omnibus clause required

the use of the automobile to be with the permission of its named insured, Mr. Mehlin; otherwise, Insurer could deny liability for the accident. Its claims department and adjusters knew that such permission was required. Insurer's assistant claims superintendent for Northern California, Mr. Hunt, admitted it was the duty of Insurer's claims department, when the notice of this accident was received on November 3, 1947, to first determine whether Insurer had coverage of the loss; and, if it did, whether there was any liability for the loss covered by its policy (T. 152, 174, 197); and Insurer's Nebraska claims superintendent, by his letter of February 11, 1948, pointed out to Mr. Hunt that the condition which controlled Insurer's coverage was the question of Claggett's permission, and, because of the intricacies of the California law, he refused to write the excess suit notice and asked Mr. Hunt to take care of writing such notice according to California law (T. 204). Such letter is undisputed evidence of Insurer's recognition of its duty to inquire concerning permissive use.

Second, at the time it assigned this loss to its adjuster Dennis, Insurer knew these facts:

(1) Its Nebraska office had issued its standard service automobile policy to Mr. Mehlin, a resident of Lincoln, Nebraska, covering this automobile, which was licensed by the State of Nebraska (T. 51, 174).

(2) The accident occurred in Richmond, California, and Mrs. Mehlin reported it to Insurer's office at Berkeley, California (T. 174).

(3) At the time of this accident, Claggett was driving such automobile at Richmond, California, with the permission of Mrs. Mehlin (T. 174).

(4) In the absence of waiver or estoppel on its part, Insurer's omnibus clause required the use of the automobile to be with the permission of its named insured, Mr. Mehlin; otherwise Insurer could deny liability for such accident (T. 33).

Third, on November 7, 1947, Insurer learned these facts:

(1) Its named insured, Wilbur Mehlin, was in Lincoln, Nebraska, Claggett was not personally acquainted with him and that it was physically impossible for Mr. Mehlin to have personally given Claggett permission to use this automobile (T. 196-7); and

(2) Mrs. Mehlin had brought this automobile to and was staying at Richmond, California (T. 193).

Notwithstanding all of its knowledge, for the purpose of defense, Insurer has claimed that it made no inquiry whether Claggett had Mr. Mehlin's permission before it represented to Appellee that Claggett had such required permission (T. 174, 194-197). In view of such circumstances, there was sufficient evidence for the jury to determine that Insurer, as a reasonably prudent person, should have made an inquiry concerning permission from Mr. Mehlin.

4. ACTUAL KNOWLEDGE OF INSURER SHOWN BY EVIDENCE.

On or about April 19, 1948, after learning of a "possible personal liability" on his part, Mr. Mehlin, through attorneys Ginsberg & Ginsberg, under their letter of April 18, 1948, allegedly informed Insurer's attorneys that Mrs. Mehlin did not have permission to use the car or to permit Claggett to use it (T. 102-3, B. xii). Such letter was inadmissible on the issue of permission, *Trotter v. Union Ind.*

Co. (C.C.A. 9th, 1929), 35 F. (2d) 104 and *Fredericksen v. Employers* (C.C.A. 9th, 1928), 26 F. (2d) 76. However, by stipulation its contents was summarized in reference to Dana's affidavit, which was admitted only on the issue of estoppel (T. 100). Such letter did give Insurer written notice of Claggett's alleged lack of permission. Notwithstanding such notice, Insurer continued to permit Appellee to believe its policy covered this accident and to incur the trouble and expense of preparing for the trial of the wrongful death action, and on two occasions within a week to ten days of the trial date of July 7, 1948, Insurer informed Appellee that if Appellee would stipulate to a continuance to the trial date for such action, Insurer would work out a settlement (T. 93); see, *Home Fire Ins. Co. v. Kuhlman* (1899), 58 Neb. 488, 78 N. W. 936, where similar knowledge on the part of the insurer was the basis of a waiver.

5. INTENT OF INSURER TO WAIVE SHOWN BY EVIDENCE OF INSURER'S CONDUCT.

There was sufficient evidence from which the jury could and did find that an intent to waive was implied from Insurer's conduct. The following evidence shows that Insurer treated its policy as a valid and subsisting contract and induced Appellee to act in that belief:

After previously informing Appellee's attorneys that it did not have any policy covering Claggett, on December 3, 1947, Insurer, of its own volition, informed Appellee's attorneys that it had found it was in error and it did have a policy covering this accident (T. 85). All conduct of Insurer thereafter, until July 2, 1948, according to its natural import, was so inconsistent with the intent to enforce any defense of lack

of permission under said policy, as to induce a reasonable belief on the part of Appellee that any such defense was waived.

On December 31, 1947, Gripenstraw reiterated to Appellee's attorneys that its policy covered this accident and stated that Insurer was satisfied Claggett had permission to use the car and offered to settle this case for \$7,500.00 (T. 85-87). On January 13 and 22, 1948, he discussed settlement further with Appellee's attorneys, and on January 28, 1948, Hunt reopened settlement discussions and offered up to \$8,500.00 in settlement (T. 88-89). On February 5, 1948, Hunt informed Appellee's attorneys that Insurer would turn the case over to its attorneys for defense, and on February 6, 1948, he requested a further extension of time for such purpose and informed them that Dana, Bledsoe & Smith would represent Claggett on its behalf (T. 89, 161). Thereafter, Insurer's attorneys filed an answer for Claggett in such death action and admitted permission from Insurer's named insured (T. 90-91). Insurer's attorneys then arranged for the trial date of July 7, 1948, and had it set for trial on such date (T. 92-93); and within a week to ten days of such trial date, on two occasions, informed Appellee's attorneys that a settlement could be worked out if Appellee would stipulate to a continuance of such trial. What other acts could Insurer have done to show that it was treating such policy as valid and covering this accident?

- a. **Insurer's conduct not justified by Insurer's alleged failure to inquire of alleged policy defenses.**

Before making its representations to Appellee, it was Insurer's duty to inquire of Mr. and Mrs. Mehlin

whether Mrs. Mehlin had such permission (see page 42 hereof setting out the authorities showing Insurer's duty to inquire). Insurer's motive or mistake in making such representations does not preclude a waiver or estoppel, for it was Insurer's duty before undertaking Claggett's defense or negotiating settlement to investigate all facts in connection with the loss, including possible policy defense. In 29 Am. Jur. 672, the Insurer's duty to inquire has been summarized and, in part, states:

"The general rule supported by the great weight of authority is that if a liability insurer, with knowledge of a ground of forfeiture or non-coverage under the policy, assumes and conducts the defense of an action brought against the insured, without disclaiming liability and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage.^{5*} The insurer's conduct in this respect operates as an estoppel to later contest an action upon the policy, regardless of the fact that there has been no misrepresentation or concealment of material facts on its part,⁶ and notwithstanding the facts may have been within the knowledge of the insured equally as well as within the knowledge of the insurer.⁷ The reason which impels the insurer to defend the suit⁸ or its good faith in doing so is likewise immaterial.⁹ Indeed, the fact that the insurer's conduct may have been due to a mistake of law does not in and of itself prevent such an estoppel of the insurer.¹⁰

* * * * *

However, a liability insurer does not, by conducting the defense of a suit against the insured,

*Arabic numerals refer to footnotes.

waive a ground of forfeiture or noncoverage of which it at that time has no knowledge,¹⁶ especially where, in addition to such lack of knowledge, the insurer is misled by misrepresentations into defending the suit.¹⁷ But if the liability insurer conducts a defense of a suit against the insured after having received information sufficient to put it upon inquiry as to the ground of nonliability which it later seeks to assert against the insured, it will be precluded from disclaiming liability upon such ground.¹⁸ There is also authority to the effect that it is the insurer's duty, before undertaking the defense of the case against the insured, to investigate all the facts in connection with the supposed loss, as well as any possible defense upon the policy.¹⁹

In view of Insurer's duty to inquire and such conduct on its part, the evidence was ample for the jury to determine that Insurer intended to waive a policy defense of lack of permission.

6. DETRIMENT TO APPELLEE SHOWN BY EVIDENCE.

Whether Appellee suffered any detriment by reason of Insurer's conduct is a question of fact for the jury. There was sufficient evidence from which the jury could and did find Insurer misled Appellee to her prejudice.

a. Appellee lost right to fairly appraise settlement offers.

Every plaintiff and every insurer has an equal right to determine whether a claim involved should be settled or contested. In making such determination and evaluating a settlement offer, the plaintiff and the insurer is entitled to regard as true, and to rely upon a representation of a material fact by the other. In appraising the settlement value of Appellee's claim,

Appellee and her attorneys were entitled to accept as true, and to rely upon, an express representation made on at least four occasions that Insurer's policy covered this accident and Claggett. The four occasions were as follows:

1. On or about December 3, 1948, adjuster Dennis informed the attorneys for Appellee that Insurer had a policy covering this accident and that Insurer's previous report to the contrary was in error (T. 85);

2. On December 31, 1947, adjuster Gripenstraw stated that Insurer's policy covered this accident, that Claggett had permission to use the car, and that Insurer would pay \$7,500.00 in settlement of the claim (T. 85-87);

3. On January 28, 1948, claims superintendent Hunt stated that Insurer would pay up to \$8,500.00 in settlement of the claim, and thereafter, when such offer was rejected, stated Insurer was turning the defense of the case over to its attorneys and they would represent Claggett (T. 88-89);

4. On February 17, 1948, Attorney Dana, as the duly authorized representative of Insurer, filed a verified answer on behalf of Claggett, which expressly admitted that Claggett was driving the automobile with the permission of Wilbur Mehlin.

It is the uncontradicted evidence that in appraising the settlement value of this claim, Appellee accepted as true, and relied upon such representations of coverage and permission; further, that if the Insurer had not made such representations, Appellee would have caused an independent investigation to be made concerning Claggett's permission, and weighed each set-

tlement offer in the light of what such investigation disclosed (T. 92).

In Appellee's negotiations with Insurer, there was never any fact which would indicate to Appellee that Insurer had not made an investigation concerning permissive use or that such representations that Claggett had permission were false. An ordinary person would not expect an insurer to make such an offer of \$7,500.00-\$8,500.00 of its policy limit of \$10,000.00 if such representations were false.

b. Appellee incurred trouble and expense of commencing and preparing death action for trial.

As pointed out in *Continental Casualty Co. v. Curtis Publishing Co.* (C.C.A. 3d, 1938), 94 F. (2d) 710, prejudice resulted to Appellee because if an immediate investigation had been made by her, she might have (1) had available testimony of witnesses familiar with the transaction and would have had the full cooperation of Claggett to whose interest it was to prove that he had the necessary permission in order to provide indemnification for himself, and (2) been satisfied from her investigation that there was no permission, and as a result would not have gone to the expense to bring such death action or the action on this policy. See, *Home Fire Ins. Co. v. Kennedy* (1896), 47 Neb. 138, 66 N. W. 278, where the Court held the cost and trouble to perfect a proof of loss was sufficient detriment to an insured to raise a waiver or estoppel against the Insurer.

In this case, Appellee, in good faith, relied upon express representations of Insurer and Insurer's conduct, which induced Appellee to believe this policy

was a valid and subsisting contract covering Claggett, and she, thereby, was trapped into a situation where she lost her right to fairly appraise the settlement value of her claim and incurred the trouble and expense of the death and policy actions.

7. OMNIBUS CLAUSE IS SUBJECT TO WAIVER.

An omnibus clause extends the insurance under an automobile insurance policy to any person driving the insured automobile with the permission of its named insured. The condition which makes such clause applicable is the permission of the named insured, and such condition is subject to waiver or estoppel. Since we have not found any California or Nebraska decision, we cite the following cases, which held that an insurer, by its conduct, waived or was estopped to set up such condition of lack of permission:

Snedker v. Derby Oil Co. (1948), 164 Kan. 640, 192 Pac. 135, at 137;

Va. Automobile Ins. Co. v. Brillhart (1948), 187 Va. 336, 46 S. E. (2d) 377 at 380;

Peterson v. Maloney (1930), 181 Minn. 437, 232 N. W. 790;

Horn v. Commonwealth Casualty Co. (1929), 105 N.J.L. 616, 147 Atl. 483;

Vondepitte v. Preferred Acc. Ins. Co. (1929), 42 B.C. 255, 2 D.L.R. 562.

In *Snedker v. Derby Oil Co.*, supra, the Court stated:

“In 29 Am. Jur. 672, sec. 878, it is stated: ‘The general rule supported by the great weight of authority is that if a liability insurer, with knowledge of a ground of forfeiture or noncoverage under the policy, assumes and conducts the de-

fense of an action brought against the insured, *without disclaiming liability and giving notice of its reservations of rights*, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage. The insurer's conduct in this respect operates as an estoppel to later contest an action upon the policy, regardless of the facts that there has been no misrepresentation or concealment of material facts on its part, and notwithstanding the facts may have been within the knowledge of the insured equally as well as within the knowledge of the insurer. * * *"
(Italics ours.)

The Court then reviewed the applicable authorities and stated:

"It will be noted that under the general rule a liability insurer which assumes the defense of an action against the insured may save itself from the bar of waiver or estoppel in a subsequent action upon the policy if, in the action against the insured, it clearly disclaims liability under the policy, and gives notice of its reservation of a right to set up the defense of noncoverage. In the case before us the record does not disclose nor is there any contention that the insurance carrier made such a disclaimer of liability, or reserved the right to assert noncoverage in any subsequent action against it.

We proceed to the question whether there was substantial evidence that the insurance carrier (the appellant) did defend Striplin in the damage action. After careful examination of the record, we must conclude that there was ample evidence to support a finding by the jury that the insurance carrier did represent Striplin in the damage action, without disclaimer of liability and without notice of reservation of right to assert noncover-

age under the policy in any action against it. Upon such a finding the jury was required under the instructions to bring in a verdict for the plaintiff."

a. A new risk not being created.

At pages 41-50 of its Opening Brief, Insurer contends that if the doctrine of waiver or estoppel is applied, it will create a new risk under the policy. Such contention is without merit in fact as well as in law.

First, the condition of permissive use does not affect the risk borne by the insurance company under this policy.

Second, under the facts in this case, the jury must be deemed to have decided that there was no change or increase in the risk resulting from the alleged breach of the condition of permissive use; and, further, there was no evidence from which a jury could find that there was a change or increase in the risk.

Third, under both Nebraska and California Law, an insurer may waive or be estopped to assert a defense of noncoverage for breach of conditions, even though such breach caused a material increase in the risk.

The risk borne by Insurer under this policy is to pay for the damage or injury occasioned from the operation of this automobile. One of the conditions of the risk is that the automobile be used by the named insured, his spouse residing in his household, or by any person who has the permission of the named insured. There is no limitation whatever upon the number, identity or competency of the persons to whom the named insured may give his permission. As far as the Insurer is concerned, with respect to estimating the

risk involved, the named insured may give his permission to any person old enough to obtain a driver's license, or whether or not he has or is qualified to obtain a driver's license, or whether he is physically or mentally incompetent, or whether he is a careless or reckless driver. No matter how many persons are given permission by the named insured or what their driving ability, the premium charged by Insurer remains unchanged.

In view of the lack of limitations, other than age, concerning the persons who may operate the automobile with the consent of the named insured, the alleged absence of permission to Mr. Claggett (who received permission from the wife rather than directly from the named insured) cannot be regarded as changing the risk borne by Insurer under this policy. Further, there is no evidence from which the jury could have decided that there was a change or increase in the risk. Insurer offered no evidence whatever to show that Mr. Claggett was an incompetent or reckless driver but, on the contrary, offered evidence to show that the accident was caused by the negligence of decedent, Mr. Porter. As far as the evidence shows, Mr. Claggett was at least equally as competent and careful a driver as the named Insured or his wife or any other person who might have the permission of the named Insured. The jury must be deemed to have decided this issue in favor of Appellee.

b. Nebraska has held that an insurer waived or was estopped to assert a defense of noncoverage.

Nebraska has held that an Insurer waived or was estopped to assert a defense of noncoverage where the following policy conditions were breached:

1. Of fire insurance policy against *unoccupancy* of the building for more than ten (10) days prior to the fire,

Home Ins. Co. v. Kuhlman (1899), 58 Neb. 488, 78 N. W. 936;

Home Fire Ins. Co. v. Phelps (1897), 51 Neb. 623, 71 N. W. 303.

2. Of fire insurance policy against a *change of occupancy*.

Hunt v. State Ins. Co. (1902), 66 Neb. 121, 92 N.W. 921—where there was a change of occupancy from an owner residing on the property to a tenant.

3. Failure to pay *premium* before loss,

German Ins. Co. v. Shader (1903), 68 Neb. 1, 93 N. W. 972;

Higgins v. Old Line Ins. Co. (1932), 122 Neb. 254, 240 N. W. 275.

4. Of fire insurance policy requiring Insured to keep books in "iron safe,"

Jensen v. Palatine Ins. Co. (1908), 81 Neb. 523, 116 N. W. 286, at 287.

5. Of provision *prohibiting gasoline* in building,

Home Fire Ins. Co. v. Kennedy (1896), 47 Neb. 138, 66 N. W. 278.

6. Of fire insurance policy against *additional insurance*,

German Mutual Fire Ins. Co. v. Palmer (1902), 3 Neb. 688, 92 N.W. 624.

7. Of fire insurance policy against *encumbrance*,

Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N.W. 779.

- c. **California has held that an insurer waived or was estopped to assert a defense of noncoverage.**

California has held that an Insurer waived or was estopped to assert a defense of noncoverage where the following policy conditions were breached:

1. Of *failure to specify a smelter* in fire insurance policy,
Mackintosh v. Agricultural Fire Ins. Co. (1907),
 150 Cal. 440, at 447-448, 89 Pac. 102.
2. Of condition *prohibiting gasoline* in home,
Arnold v. American Insurance Co. (1906), 148
 Cal. 660, 84 Pac. 182;
Kruger v. Western Fire & Marine Ins. Co.
 (1887), 72 Cal. 91, 13 Pac. 156.
3. Of failure to pay *premium*,
Farnum v. Phoenix Ins. Co. (1890), 83 Cal. 246,
 23 Pac. 869.
4. Of provision in boat insurance policy against
transfer of title,
Hilton v. Federal Ins. Co. (1931), 118 Cal. App.
 495, 5 P. (2d) 648.
5. Of provision in fire policy against *change in
 location of merchandise*,
Reid v. Northern Assur. Co. (1923), 63 Cal.
 App. 114, 218 Pac. 290.

See companion case:

Steil v. Sun Insurance Office (1916), 171 Cal.
 795, 155 Pac. 72.

It is difficult to see any reasonable distinction between a breach of a condition against change of occupancy, unoccupancy, failure to pay a premium, iron safe clause, transfer of title (encumbrance), change of

location of merchandise, or "prohibited article clause," and a condition of permissive use of an automobile, as each goes equally to the issue of coverage.

Insurer has cited two California cases, *Conner v. Union Auto. Ins. Co.* (1932), 122 Cal. App. 105, 9 P. (2d) 863, involving an express exclusion against trailers, and *Hancock etc. Ins. Co. v. Markowitz* (1944), 62 C. A. (2d) 388, 144 P. (2d) 899, involving a false representation of Insured's physical condition, from which it asks this Court to conclude that the condition of permissive use is not subject to waiver or estoppel. These cases do not warrant such a generalization, as the Court merely held that under the particular facts of each case the evidence did not show an estoppel or waiver. In the *Conner* case, there was no estoppel as the conduct of the Insurer did not mislead or prejudice the insured and there was no waiver, as the Insurer had no information that indicated the Insured intended to use a trailer with his automobile. In the *Markowitz* case, the insured made fraudulent representations to his insurer and one can never involve an estoppel to protect himself from his own fraud.

Likewise, Insurer has cited a Nebraska case, *Card v. Minn. Fire Ins. Co.* (1941), 139 Neb. 602, 298 N. W. 157, which is distinguishable upon the grounds that the seller of the car did not request insurance from his Insurer for its purchaser and the Insurer did not know the purchaser wanted insurance.

Insurer has also cited several Federal cases, *Van Meter v. Franklin Fire Ins. Co.* (C.C.A. 9th 1907), 164 F. (2d) 325; *Fidelity & Guaranty Fire Corp. v. Bilquist* (C.C.A. 9th 1938), 99 F. (2d) 333; *Carnes &*

Co. v. Employers Liability Assur. Corp. (C.C.A. 5th 1939), 101 F. (2d) 739, and *Commercial Standard Ins. Co. v. Robertson* (C.C.A. 6th 1947), 159 F. (2d) 405, which are distinguishable. The *Van Meter* case involved a change of location and the *Bilquist* case a change of occupancy and of location. Each arose on an insurance contract made in Washington. Under the *Tompkins* case, this Court applied the Washington rule that a breach of such provision could not be waived or give rise to an estoppel. In the *Carnes* case, the Sixth Circuit applied the same rule to a breach of a provision against hauling butane. California and Nebraska have held to the contrary in *Reid v. Northern Assur. Co.* (1923), 63 Cal. App. 114, 218 Pac. 290 (change of location of merchandise), *Hunt v. State Ins. Co.* (1902), 66 Neb. 121, 92 N. W. 921 (change of occupancy), *Mackintosh v. Agricultural Fire Ins. Co.* (1907), 150 Cal. 440, at 447-448, 89 Pac. 102 (smelter in building), and *Arnold v. American Insurance Co.* (1906), 148 Cal. 660, 84 Pac. 182 (gasoline in building); *Kruger v. Western Fire & Marine Ins. Co.* (1887), 72 Cal. 91, 13 Pac. 156 (petroleum in building); further, since under the *Tompkins* case the California rules (and the Nebraska rules to the extent California would apply them) apply in this case, neither the Washington nor Louisiana rule should be considered on this appeal. The *Robertson* case only held that under the evidence in such case a waiver or estoppel did not arise.

Nebraska has expressly held that provisions of an insurance policy limiting or avoiding liability are strictly construed against an insurer and liberally in favor of an insured,

Soehner v. Grand Lodge (1905), 74 Neb. 399,
104 N. W. 871;

and California has declared in *Knarston v. Manhattan L. Ins. Co.* (1899), 124 Cal. 74, 77, 56 Pac. 773:

“The law does not like forfeitures and evidence tending to show the waiver of a forfeiture will be looked upon with kindly eyes.”

8. NON-WAIVER CLAUSES SUBJECT TO WAIVER AND ESTOPPEL.

A fair statement of the rule that such clauses may be waived is found in 29 *Am. Jur.* 623, as follows:

“The rule, which is most favorable to the insured and, it may be observed, is well supported by authorities, is that policy provisions which limit the power of insurance agents or other representatives of the insurer to waive conditions of the policy or restrict the manner in which waivers may be made do not supersede the recognized principles of the law of waiver and estoppel, and are not conclusive so as to prevent the officers or agents of the insurer through whom it must act in the transaction of its business, and the conduct of its affairs, from binding the insurer by a waiver of a condition or from creating an estoppel against it to assert a breach of condition in avoidance of the policy. In other words, a nonwaiver clause may itself be waived.”

Paragraph 8 of Insurer's policy reads as follows:

“8. *Changes.* Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a

part of this policy signed by an executive officer of the company.”

At the outset, it should be noted that such clause does not preclude a waiver or estoppel if the company has notice. Under the evidence in this case all the information its agents obtained was reduced to writing and placed in Insurer's file, and Insurer's board, in fixing a reserve for and placing its settlement value on this claim, knew the contents of such file. Certainly, an insurance company cannot blindfold itself to such knowledge and thereby preclude a waiver or estoppel on its part.

Nebraska has repeatedly held that such clauses did not prevent a waiver.

Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559, 88 N. W. 779;

Hunt v. State Insurance Co. (1902), 66 Neb. 121, 92 N. W. 921;

German Insurance Co. v. Shader (1903), 68 Neb. 1, 93 N. W. 972;

German Mutual Fire Ins. Co. v. Palmer (1902), 3 Neb. 688, 92 N. W. 624.

Insurer relies upon *Northern Assur. Co. v. Grand View Bldg. Asso.* (1902), 183 U.S. 308, 46 L. Ed. 213, and *German Insurance Co. v. Heidnuk* (1890), 30 Neb. 288, 46 N. W. 481; *Jensen v. New York Life* (C.C.A. 8th 1932), 59 F. (2d) 957; *Fidelity Mutual Fire Ins. Co. v. Lowe* (1903), 4 Neb. 159, 93 N. W. 749; *McElroy v. Metropolitan Life Ins. Co.* (1909), 84 Neb. 866, 122 N. W. 27; *Card v. Minn. Fire Ins. Co.* (1941), 139 Neb. 602, 298 N. W. 157; *Pickens v. Maryland Casualty Co.* (1942), 141 Neb. 105, 2 N. W. (2d)

593; and *American Fire Ins. Co. v. Landfare* (1898), 56 Neb. 482, 76 N. W. 1068, to support its view that its non-waiver clause is not subject to waiver or estoppel. A reading of these cases shows they do not support Insurer because *Northern Assur. Co. v. Grand View Bldg. Asso.*, supra, and *German Insurance Co. v. Heidnuk*, supra, were rejected in *German Mutual Fire Ins. Co. v. Palmer* (1902), 3 Neb. 688, 92 N. W. 624, where the Supreme Court of Nebraska said:

“* * * The recent decision of the Supreme Court of the United States in *Northern Assurance Co. v. Grand View Bldg. Ass’n.*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 313, is chiefly relied upon in this connection, and that case has been urged upon our attention so persistently of late that it seems proper to state the reasons moving us to adhere to the course of decision long established in this jurisdiction, notwithstanding the great authority of the tribunal which has adopted a different doctrine.”

In *Jensen v. New York Life* (C.C.A. 8th 1932), 59 F. (2d) 957, insured actually knew that the agent lacked authority and did not act to his prejudice, and the Court followed *Northern Assurance Co. v. Grand View Bldg. Asso.* (1902), 183 U. S. 308, 46 L. Ed. 213, which Nebraska has expressly rejected in *German Mutual Ins. Co. v. Palmer* (1902), 3 Neb. 688, 92 N.W. 624.

The following cases are distinguishable on their facts:

McElroy v. Metropolitan Ins. Co. (1909), 84 Neb. 866, 122 N. W. 27; question was whether time for payments of premiums was ex-

tended; and Court held evidence was insufficient to show agent had made such extension or that the company had waived its rights; further, in *German Ins. Co. v. Shader* (1903), 68 Neb. 1, 93 N.W. 972, and *Higgins v. Old Line Ins. Co.* (1932), 122 Neb. 254, 240 N. W. 275, a failure to pay a premium was held to be waived;

Pickens v. Maryland Casualty Co. (1942), 141 Neb. 105, 2 N. W. (2d) 593—action on contractor's liability policy, Court held that under the facts, there was no estoppel or waiver, as evidence showed insured knew of the restriction in the policy, failure to read a policy cannot be a basis for estoppel, and insurer did not induce insured to change his position or cause him to rely upon its conduct to his detriment.

It is difficult to understand what comfort Insurer finds in *American Fire Ins. Co. v. Landfare, supra*, and *Fidelity Mutual Fire Ins. v. Lowe, supra*, as in each of those cases a breach of condition was held waived by insurer.

California has repeatedly held that a non-waiver clause is subject to waiver,

Knarston v. Manhattan Life Ins. Co. (1899), 124 Cal. 74, 77, 56 Pac. 773;

Mackintosh v. Agricultural Fire Ins. Co. (1907), 150 Cal. 440, 449, 89 Pac. 102;

Raulet v. Northwestern Natl. Ins. Co. (1910), 157 Cal. 213, 107 Pac. 292;

Grant v. Sun Indemnity Co. (1938), 11 C. (2d) 438, 80 P. (2d) 996;

Reid v. Northern Assur. Co. (1923), 63 Cal. App. 114, 218 Pac. 290.

California has distinguished *Northern Assur. Co. v. Grand View Bldg. Asso.* (1902), 183 U.S. 308, 46 L. Ed. 213 and *Gladding v. California etc. Ins. Co.* (1884), 66 Cal. 6, 4 Pac. 764 and refused to follow them. In *Mackintosh v. Agricultural Fire Ins. Co.* (1907), 150 Cal. 440, at page 449, 89 Pac. 102, it is stated:

“In *Gladding v. California etc. Ins. Co.*, 66 Cal. 6 (4 Pac. 764), the agent who attempted to waive the conditions was a local agent, and not, as here, a general agent, who, for contractual purposes, impersonated the company itself. The general remarks contained in the opinion in that case cannot be deemed authority, so far as they indicate a lack of power in the general agent to waive such conditions by acts amounting to a new contract or an estoppel, and without indorsement upon or attached to the policy. In *Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408, and *Enos v. Sun Ins. Co.*, 67 Cal. 621 (8 Pac. 379), it was held that a mere local agent was without such authority unless specially empowered. This is the substance of the decision of the supreme court of the United States in *Northern Assur. Co. v. Grand View B. A.*, 183 U.S. 308 (22 Sup. Ct. Rep. 153, 154.)”

and *Hargett v. Gulf Ins. Co.* (1936), 12 C. A. (2d) 449, 55 P. (2d) 1258 is distinguished upon the grounds that the insurer did not do anything to induce insured to rely upon the validity of his policy.

The other Nonwaiver Provision contained in Insurer's policy in Paragraph 2 of Supplemental Agreements, which reads as follows:

“Acts of the Company or its representatives in performing the duties or exercising the rights under this agreement shall not operate to waive the Company’s rights nor estop it from asserting any defense under the policy.”

Such provision is not applicable for the following reason: Since in this policy such clause immediately follows subparagraphs (a) and (b) of said paragraph 2, the acts referred to in such clause must necessarily relate to the acts specified in said subparagraphs (a) and (b), which precede it and state:

“(a) under coverage A (1) the Company shall

1. defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company;
2. pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the Company, all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Company’s lia-

bility thereon, and expenses incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident;

- (b) the Company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request." (T. 32-33.)

All that this non-waiver clause provides is that the mere fact the company defends the suit, investigates it, negotiates settlement or makes certain payments shall not constitute a waiver or estoppel. Such enumeration of acts does not state that the company shall have the right to do other acts without incurring a waiver or estoppel, e.g., (1) make a misrepresentation of a material fact of which it had knowledge and induce a third party beneficiary of its policy to believe and rely upon such representation as a true statement of a material fact to her detriment; or (2) with knowledge of a policy defense, make representations and by its conduct recognize its policy as a valid and subsisting contract.

The Nebraska law is well settled that a non-waiver clause shall be strictly construed against the insurer, *German Insurance Co. v. Shader* (1903), 68 Neb. 1, 93 N. W. 972.

Certainly, a non-waiver provision should not permit an insurer to make a representation that its policy covers a loss and induce the third party beneficiary to rely upon the validity of such policy; nor should a non-waiver provision permit an insurer to misrepresent its coverage under its policy or a fact material to

its coverage in negotiations for settlement of a claim with knowledge of its policy defense. This clause does not in any way refer to a misrepresentation of a material fact by the Insurer.

It should be observed that *this non-waiver provision is so broad that even the company itself cannot waive it*. As to such a broad non-waiver provision, 29 Am. Jur., at page 624, states:

“A non-waiver clause may itself be waived. This is especially true where the restriction is so sweeping as to prevent even the highest rank officers of the insurer from affecting a waiver. In such case the restriction is nugatory and defeats itself.”, citing 13 L.R.A. (NS) 839, which states the rule as follows:

“2. *Rule that company cannot prohibit itself from waiving.* Where the nonwaiver agreement is so sweeping as to tie the hands of the company itself, it has sometimes been held nugatory. Under this rule, an agent may waive terms and conditions of the policy to the same extent that he could if it had been silent on the subject of waiver.”

and cites the following cases in support of such rule:

Long Island Ins. Co. v. Great Western Mfg.

Co., 2 Kan. App. 377, 42 N. W. 739;

Wilkins v. State Ins. Co. (1890), 43 Minn. 177, 45 N. W. 1;

Andrus v. Maryland Casualty Co. (1904), 91 Minn. 358, 98 N. W. 200;

Wolf v. Dwelling House Ins. Co. (1898), 75 Mo. App. 337;

Home Ins. Co. v. Gibson (1894), 72 Miss. 58, 17 So. 13;

Farnum v. Phoenix Ins. Co. (1890), 83 Cal. 246, 261, 17 Am. St. Rep. 233, 23 Pac. 869.

And, as pointed out in *Grant v. Sun Indemnity Co.* (1938), 11 C. (2d) 438, 80 P. (2d) 996:

“It is a well recognized rule, which we conclude is applicable to the special circumstances here, that the insurer may not repudiate the policy, deny all liability and at the same time be permitted to stand on a provision in the policy for its benefit.”

9. AUTHORITY TO WAIVE.

A review of the facts of this case shows that Insurer, itself, is the one who made the waiver. Insurer authorized Dennis to make and report the investigation; Insurer's Board, whose duty it is to review such claims, scrutinized Dennis' report and fixed a settlement value on the claim of \$8,500.00 to \$9,000.00; its authorized claims department then sought to negotiate settlement for \$7,500.00 and made representations concerning its investigation; its authorized claims department wrote its so-called “excess coverage” letter admitting its coverage, accepting the defense of the claim; its authorized attorney made a written representation of the necessary permission; and at all times from November 3, 1947 to July 2, 1948, Insurer conducted itself with knowledge of its policy defenses, and its entire course of conduct was carried on by Insurer itself through the only way a corporation can act, namely, its agents.

Insurer did *not* offer any evidence that

1. Mr. Dennis had no authority to make the investigation of this claim in which he gained constructive knowledge of Insurer's policy defense; or

2. Mr. Dennis had no authority to tell Mr. Castro on December 3, 1947, that Insurer did

have a policy covering this accident and that Insurer's earlier report to the contrary was in error; or

3. Insurer's Board of Review had no authority to review this claim in the light of Mr. Dennis' investigation and written reports, or fix the settlement value of \$8,500.00 or \$9,000.00; or

4. Mr. Gripenstraw had no authority to call on Mr. Castro and discuss the permissive use issue; or

5. Mr. Hunt had no authority to negotiate settlement with Mr. Castro; or

6. Mr. Dana had no authority to file a verified answer on behalf of Mr. Claggett, intentionally admitting permissive use or to later discuss settlement of this claim with Mr. Castro; or

7. Mr. Gibson had no authority to write his inter-office memorandum of February 11, 1948, concerning Mr. Claggett's lack of permission from Wilbur Mehlin; or

8. The "excess coverage" letter admitting coverage and accepting the defense of this claim was not authorized.

How can Insurer, in the face of such evidence concerning the conduct of its agents, now contend that the jury had no basis for finding that such agents were acting within the scope of their employment?

Further, Nebraska has held that an insurer which commits to its agents the inspection of its risks is charged with knowledge of the facts learned by such agent as inspector.

Phoenix Ins. Co. v. Holcomb (1899), 57 Neb. 622, 78 N.W. 300.

10. RESERVATION OF RIGHTS DID NOT CURE
WAIVER AND ESTOPPEL.

The waiver and estoppel occurred prior to Insurer's notice of reservation of rights of July 9, 1948, and the execution of the reservation of rights agreement of July 13, 1948. Where a breach of a condition of an insurance policy has once been waived, it is waived for all times and cannot be recalled.

German Ins. Co. v. Shader (1903), 68 Neb. 1, 93 N.W. 972;

Home Fire Ins. Co. v. Kuhlman (1899), 58 Neb. 488, 78 N.W. 936;

Jones v. Maria (1920), 48 Cal. App. 171, 191 Pac. 943;

Kruger v. Western Fire & Marine Ins. Co. (1887), 72 Cal. 91, 94, 13 Pac. 156.

Further, a reservation of rights taken after such waiver has once occurred is immaterial and not binding on the injured party or the Insured.

Empire State Surety Co. v. Pac. Nat. Lumber Co. (C.C.A. 9th, 1912), 200 Fed. 224;

Rieger v. London Guaranty & Acc. Co. (1919), 202 Mo. App. 184, 215 S.W. 920.

At pages 20-22 of its opening brief, Insurer has cited several cases that hold in an action on a policy, in the absence of waiver or estoppel, a breach of the cooperation or notice provisions of an insurance policy is a defense to the Insurer when it shows that it is prejudiced by such breach; otherwise, such breach is not a defense.

Abrams v. American F. & C. Co. (1948), 32 C. (2d) 233, 195 P. (2d) 797.

Such cases do not hold that an insurer's waiver or estoppel may be cured by a subsequent disclaimer of liability or reservation of rights.

**11. "PRINCIPALLY GARAGED AND USED" PROVISION
NOT VIOLATED.**

The evidence shows that Mrs. Mehlin brought this car to California for a visit, and at the time of this accident it had been in California for two weeks. When interviewed by Insurer in Richmond, Mrs. Mehlin gave her mail and home address as her home with Mr. Mehlin in Lincoln, Nebraska. The jury was entitled to find from such evidence that the car was still "principally garaged and used" at Lincoln, Nebraska, and that Mrs. Mehlin was on a temporary trip in California.

a. Uncertainty of such provision makes it unenforceable.

Nebraska has not passed on these provisions of

Insurer's policy:

"Declaration 1.

The automobile(s) will be principally garaged and used in the above town, county and state (T. 51).

Condition 1.

Policy Period, Territory, Purposes of Use. This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations" (T. 38).

However, *Sutton v. Hawkeye Casualty Co.* (C.C.A. 6th, 1943), 138 F. (2d) 781 has construed the identical provisions as too uncertain to enforce, stating at page 785:

“Not alone, however, to the contention that the use of the vehicle actually complied with the claimed promissory warranty, but also to the requirement that clauses of warranty, condition, exclusion, and forfeiture, be certain and explicit, is the adoption of the phrase, ‘principally used,’ relevant. ‘Principally’ is a vague, indefinite, uncertain term. Here it is sought, by the use of that term, to limit the use of the automobile to a specified locality, while at the same time, the parties, without qualification, expressly authorized its use during the period of a year, anywhere in Canada or the United States.

Whether the statement under the heading of ‘Warranties’ be considered a promissory warranty or a condition, the uncertain language must be construed strictly against the insurer and liberally in favor of the assured, to effect the insurance. Furthermore, in determining whether the statement be a promissory warranty or merely an expression of expectation on the part of the assured, a like construction is indulged against the insurer to avoid a forfeiture. If insurance companies wish to exact from insured persons, warranties and agreements as conditions to a valid contract, the terms of the policy to that effect must be so clear as to exclude any other conclusion. See *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 341, 4 S. Ct. 466, 28 L. Ed. 447.

The statement that the automobile would be principally used in Kalamazoo could, by itself, be understood as a statement of expectation, as fairly as an undertaking that the owner bound

himself to such a use, under penalty of having the policy considered void. The provisions of forfeiture were not sufficiently explicit; and clauses of forfeiture in an insurance contract must be explicit. *Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 103. Certainly, the intent of the parties, as gathered from the language of the policy, with regard to this provision, is not so clear as to exclude the conclusion that it was stated as an expression of intention on the part of the assured, and that it was not intended that the policy should be void as a result of change of residence and use of the car elsewhere. Liberally construed with the other provisions, in favor of the assured, the statement in question is to be interpreted as merely a representation of intention on the part of the owner, rather than as a warranty, condition, or agreement.

The indefinite phrasing of the statement relied upon as a condition of the contract, when considered in connection with the broad coverage of the policy, its susceptibility of different interpretations, and the requirement that the language be construed to effect the insurance unless it is so clear as to preclude any other construction, likewise commands a construction in favor of the assured against forfeiture."

Likewise, Insurer's policy does not state "Declaration (1)" is a warranty or that a change in garaging or use will void its policy. The California cases cited by Insurer are distinguishable, as follows:

Purcell v. Pacific Automobile Ins. Co. (1937), 19 C. A. (2d) 230, 64 P. (2d) 1114—it was an express warranty in policy which made policy void; further, during term of policy

vehicle was never garaged at warranted location;

Kindred v. Pacific Auto. Ins. Co. (1938), 10 C. (2d) 463, 75 P. (2d) 69—same policy provisions as *Purcell* case and truck used continuously outside warranted location;

C.I.T. Corp. v. American Cent. Ins. Co. (1937), 18 C. A. (2d) 673, 64 P. (2d) 742—likewise, express warranty and evidence offered that rate at place where used was 10 times greater than at warranted location. In case at bar, insurer offered no evidence of any change in rate for its policy.

b. Waiver and estoppel preclude Insurer's right to assert such defense.

Insurer has waived this provision of its policy. Within a few days after this accident, Insurer had actual knowledge of where the automobile was being used and for what period, and all its conduct for eight months thereafter was inconsistent with any claim of such policy defense on its part, and such conduct induced Appellee to believe Insurer recognized its policy as a valid and subsisting contract with Claggett and Appellee, *Hartford Fire Ins. Co. v. Landfare* (1902), 63 Neb. 559, 88 N. W. 779; and, since such conduct has prejudiced Appellee, it would also constitute an estoppel.

IV.

CONCLUSION.

A review of the record shows that there is substantial evidence to support the verdict of the jury (1) that Claggett had the implied permission of Insurer's named insured to use the automobile at the time of this accident; (2) that the place where the automobile was to be "principally garaged and used" was not changed, contrary to the provisions of said policy; (3) that Insurer had constructive knowledge of such alleged defense of lack of permission or violation of its provision covering the place where the automobile was "principally garaged and used" and that the conduct of Insurer was such as to warrant an inference of its intention to waive its right to such alleged defenses; and (4) that the conduct and representations of Insurer misled Appellee and Appellee, in reliance upon such conduct and representations, acted to their detriment, and, therefore, Insurer is estopped to assert its alleged defenses.

It is respectfully submitted that for the foregoing reasons the judgment for Appellee and the order of the trial court denying Insurer's motion for a directed verdict and a judgment *non obstante veredicto* should be affirmed.

Dated, San Francisco, California,
August 18, 1950.

AUGUSTUS CASTRO,
COOLEY, CROWLEY & GAITHER,
Attorneys for Appellee.

No. 12,531

IN THE

United States Court of Appeals
For the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE IN-
SURANCE COMPANY (a corporation),

Appellant,

VS.

BERTHA LEE PORTER, as Special Ad-
ministratrix of the Estate of Charles
E. Porter, Deceased,

Appellee.

APPELLANT'S CLOSING BRIEF.

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Subject Index

	Page
I.	
Since the insurance contract in question was entered into in Nebraska, the law of Nebraska should be applied here in determining the rights of the parties thereunder.....	1
II.	
The issues on this appeal are not limited to a consideration of the sufficiency of the evidence to support the jury's verdict	3
III.	
The evidence was, as a matter of law, insufficient to establish permissive use; any inference of permission was dispelled as a matter of law by the uncontradicted evidence establishing the non-existence of permission.....	4
(a) The court is not restricted to a consideration of plaintiff's evidence in determining whether or not there was sufficient support for the verdict of the jury.....	4
(b) The evidence was insufficient to support a finding of permissive use	6
(c) The fact that Claggett had express permission of Mrs. Mehlin is of no consequence as to the issue of initial permission	9
(d) The so-called "admissions" of coverage and permission by insurer are not evidence of the alleged fact of permission and cannot be so considered.....	9
(e) The presumptions of obedience to the law and innocence of wrong may not here be invoked by appellee	12
(f) Appellee's "proof" and any inferences arising therefrom were conclusively rebutted by appellant's evidence	13
IV.	
As a matter of law the evidence was insufficient to establish waiver or estoppel	17

	Page
V.	
The omnibus clause in appellant's policy was not subject to waiver, and coverage under its terms could not be extended by the devices of waiver and estoppel	26
VI.	
The provisions of the policy against waivers except in writing could not be waived under the facts of this case, and prevent the existence of waiver	31
VII.	
The declaration concerning principal place of use and garaging of the vehicle was breached when the wife brought the vehicle to California with the intention of remaining there	34
VIII.	
Conclusion	35

Table of Authorities Cited

Cases	Pages
American Fire Insurance Company v. Landfare (1898), 56 Neb. 482, 76 N.W. 1068	23
Barcus v. Campbell (1949), 90 Cal. App. (2d) 768, 204 Pac. (2d) 65	13
Baxter v. National Mortgage Loan Co. (1935), 128 Neb. 537, 259 N.W. 630	23
Bayless v. Mull (1942), 50 Cal. App. (2d) 66, 122 P. (2d) 608	19
Blank v. Coffin (1942), 20 Cal. (2d) 457, 126 Pac. (2d) 868	6
Boole v. Union Marine Ins. Company, 52 Cal. App. 207	28
Bradford v. Sargeant (1933), 135 Cal. App. 324.....	12
Brown v. Spencer (1912), 163 Cal. 589, 126 Pac. 493	10
Bachman v. Independents Indemnity Company (1931), 112 Cal. App. 465, 297 P. 110	18
Burgess v. Cahill (1945), 26 Cal. (2d) 320, 158 P. (2d) 399	19
Chakmakjian v. Lowe (1949), 33 Cal. (2d) 308, 201 Pac. (2d) 801	5, 6
Connecticut Indemnity Co. v. Howe, 41 Fed. Sup. 222.....	34
Continental Casualty Company v. Curtis, 94 F. (2d) 710 ..	25
Coward v. Clanton (1889), 79 Cal. 23, 21 Pac. 359	10
Curry v. Williams (1930), 109 Cal. App. 649, 293 Pac. 623	2
Delanoy v. Delanoy (1932), 216 Cal. 27, 13 Pac. (2d) 719	2
diRebaylio v. Herndon (1935), 6 Cal. App. (2d) 567.....	13
Dolinar v. Pedone (1944), 63 Cal. App. (2d) 169, 146 Pac. (2d) 237	11
Engstrom v. Auburn Auto. Sales Corp. (1938), 11 Cal. (2d) 64, 77 Pac. (2d) 1059	4, 5, 6, 8, 12, 13, 15, 16, 17
Estate of Burns (1938), 26 Cal. App. (2d) 741, 80 Pac. (2d) 77	5
Estate of Lances (1932), 216 Cal. 397, 14 Pac. (2d) 768....	3, 5
Gajanich v. Gregory (1931), 116 Cal. App. 622, 3 Pac. (2d) 389	10

	Pages
German Insurance Company v. Shader (1903), 68 Neb. 1, 93 N.W. 972	32
German Mutual v. Palmer (1902), 63 Neb. 688, 92 N.W. 624	32
Goode v. Smith (1859), 13 Cal. 81	11
Grant v. Sun Indemnity Co. (1938), 11 Cal. (2d) 438, 80 P. (2d) 996	32
Guberman v. Weiner (1935), 10 Cal. App. (2d) 401, 51 Pac. (2d) 1141	9
Haggard v. Fick (1935), 6 Cal. App. (2d) 392, 44 Pac. (2d) 447	9
Hartford Fire Ins. Co. v. Landfare (1902), 63 Neb. 559 88 N.W. 779	32
Hatfield v. Levy Bros. (1941), 18 Cal. (2d) 798, 117 Pac. (2d) 841	11
Helmuth v. Frame (1941), 46 Cal. App. (2d) 381	13
Holzer v. Read (1932), 216 Cal. 119, 13 Pac. (2d) 697	11
Home Fire Insurance Co. v. Kennedy (1896), 47 Neb. 138, 66 N.W. 278	25
Home Indemnity Company v. Standard Accident Ins. Com- pany, 165 Fed. (2d) 919	29
Horn v. Commonwealth (1929), 105 N.J.L. 616, 147 Atl. 483	28
Hunt v. State Insurance Company (1902), 66 Neb. 121, 92 N.W. 921	32
Hynding v. Home Accident (1932), 214 Cal. 743	18
Ingraham v. Smith (1948), 83 Cal. App. (2d) 807, 189 Pac. (2d) 721	11
Kambourian v. Gray (1947), 81 Cal. App. (2d) 783, 185 Pac. (2d) 27	10
Knarston v. Manhattan Life (1899), 124 Cal. 73, 56 Pac. 773	32
Krum v. Malloy (1943), 22 Cal. (2d) 132	13
Lanfried v. Bosworth (1941), 45 Cal. App. (2d) 408, 114 Pac. (2d) 406	12, 13
MacIntosh v. Agricultural Fire (1907), 150 Cal. 440, 89 Pac. 102	32

TABLE OF AUTHORITIES CITED

v

	Pages
Malmgren v. Southwestern Insurance Company (1927), 201 Cal. 29, 255 Pac. 512	18
Montanya v. Brown (1939), 31 Cal. App. (2d) 642, 88 Pac. (2d) 745	14, 16
Metropolitan v. Colthurst (1936), 36 Fed. (2d) 559.....	18
Nash v. Wright (1947), 82 Cal. App. (2d) 467, 186 Pac. (2d) 686	5, 12, 16
Northwestern P. C. Co. v. Atlantic P. C. Co. (1917), 174 Cal. 308, 163 Pac. 47	22
Ogburn v. Travelers Ins. Co. (1929), 207 Cal. 50, 276 Pac. 1004	2
Panhans v. Associated Indemnity (1935), 8 Cal. App. (2d) 532, 47 P. (2d) 791	18
Peterson v. Maloney (1930), 181 Minn. 437, 232 N.W. 790	28
Prickett v. Whapples (1935), 10 Cal. App. (2d) 701, 52 Pac. (2d) 972	12, 13
Purefoy v. Pacific Automobile, 5 Cal. (2d) 81	18
Raulet v. Northwestern (1910), 157 Cal. 213, 107 Pac. 292	32
Reid v. Northern Assurance Company (1923), 63 Cal. App. 114, 218 Pac. 290	29, 30, 32
Riverside Rancho v. Cowan (1948), 88 Cal. App. (2d) 197, 198 Pac. (2d) 526	11
Sage & Co. v. Alexander & Oviatt Corp. (1934), 138 Cal. App. 476, 32 Pac. (2d) 655	2
Sears v. Illinois Indemnity Company, 121 Cal. App. 211....	28
Shapiro v. Equitable (1946), 76 Cal. App. (2d) 75, 172 Pac. (2d) 725	22
Snedker v. Derby Oil (1948), 164 Kan. 640, 192 Pac. 135	28
Souza v. Corti (1943), 22 Cal. (2d) 454, 139 Pac. (2d) 645	9, 13, 19
Steil v. Sun Insurance Office (1916), 171 Cal. 795, 155 Pac. 72	29
Stewart v. Norsigian (1944), 64 Cal. App. (2d) 540, 149 Pac. (2d) 46	13
Sutton v. Hawkeye Casualty Co. (1943), 138 Fed. (2d) 681	34

	Page
Tevis v. Pitcher (1858), 10 Cal. 465	2
Tieman v. Red Top Cab Co. (1931), 117 Cal. App. 40, 3 Pac. (2d) 381	10
Valladao v. Fireman's Fund, 13 Cal. (2d) 322	18
Vanderhoof v. Chambon, 121 Cal. App. 118	19
Vaughn v. Jonas (1948), 31 Cal. (2d) 586, 191 Pac. (2d) 432	13
Virginia Automobile Insurance v. Brillhart (1948), 187 Va. 336, 46 S.E. (2d) 377	27
Western Machinery Company v. Bankers Indemnity, 10 Cal. (2d) 488	18
Weissbaum v. Eibeshutz (1930), 211 Cal. 170, 294 Pac. 396	10

IN THE
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STATE FARM MUTUAL AUTOMOBILE IN-
SURANCE COMPANY (a corporation),

Appellant,

vs.

BERTHA LEE PORTER, as Special Ad-
ministratrix of the Estate of Charles
E. Porter, Deceased,

Appellee.

APPELLANT'S CLOSING BRIEF.

I.

SINCE THE INSURANCE CONTRACT IN QUESTION WAS EN-
TERED INTO IN NEBRASKA, THE LAW OF NEBRASKA
SHOULD BE APPLIED HERE IN DETERMINING THE
RIGHTS OF THE PARTIES THEREUNDER.

Appellee is quite correct in stating that in a di-
versity case such as this it is the duty of the Federal
Court to examine the conflict of laws rule of the
forum in which it is sitting and apply it in determin-
ing which rule of law governs the situation before it.

Appellee makes the statement that the California
rule requires the application of California law to the
interpretation of a foreign contract. At page 17 of

her brief five cases are cited in support of this proposition:

The case of *Tevis v. Pitcher* (1858), 10 Cal. 465, held that the law of the locality where a will was executed should be applied in determining its efficacy. California law was followed as to the method of proving the will only for the reason that the law of the locality where the will had been executed was repealed and, therefore, nonexistent. The will in this case was executed in San Francisco at a time when it was still within Mexican territory.

In the case of *Curry v. Williams* (1930), 109 Cal. App. 649, 293 Pac. 623 and *Ogburn v. Travelers Ins. Co.* (1929), 207 Cal. 50, 276 Pac. 1004, neither Court was concerned with a choice of law as between two jurisdictions and consequently neither case can be said to hold anything with respect to a rule of conflict of laws.

In the case of *Sage & Co. v. Alexander & Oviatt Corp.* (1934), 138 Cal. App. 476, 32 Pac. (2d) 655, a warranty question arose with regard to articles manufactured and contracted for in France and delivered to the buyer in California. In touching on the question of whether or not there had been any breach of warranty appellant urged that reference must be had to *conditions* as they existed at the place of manufacture. The Court merely held that their condition on arrival was pertinent to the issue.

The case of *Delanoy v. Delanoy* (1932), 216 Cal. 27, 13 Pac. (2d) 719, was concerned with the problem of whether or not full faith and credit should be ac-

corded a decree of divorce granted by a sister state. To this extent it was concerned with conflict of laws. There was no issue as to whether Pennsylvania or California law should be applied respecting the presumption of validity and consequently the Court did not hold in this respect.

Appellee does not even mention, much less distinguish, the cases cited at page 19 of appellant's brief.

II.

THE ISSUES ON THIS APPEAL ARE NOT LIMITED TO A CONSIDERATION OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE JURY'S VERDICT.

Without the citation of a single authority appellee, on page 19 of her brief, advances the proposition that this Court is limited to a consideration of the sufficiency of the evidence as to the issues of permissive use and waiver and estoppel. That a motion for directed verdict or for judgment *n. o. v.* is in the nature of a demurrer to the evidence is a fundamental proposition. *Estate of Lances* (1932), 216 Cal. 397, 14 Pac. (2d) 768. Accordingly, the issue is tendered to this Court whether appellee is entitled to recover even assuming the evidence is sufficient to establish waiver and estoppel.

III.

THE EVIDENCE WAS, AS A MATTER OF LAW, INSUFFICIENT TO ESTABLISH PERMISSIVE USE; ANY INFERENCE OF PERMISSION WAS DISPELLED AS A MATTER OF LAW BY THE UNCONTRADICTED EVIDENCE ESTABLISHING THE NON-EXISTENCE OF PERMISSION.

- (a) The Court is not restricted to a consideration of plaintiff's evidence in determining whether or not there was sufficient support for the verdict of the jury.

Throughout her brief (pp. 17, 18, 29 and 30) appellee insists upon the proposition that this Court can consider only the evidence adduced by her below. It is claimed at page 18 of her brief that evidence for the defense must be disregarded.

It is, of course, the rule on a motion for directed verdict or for judgment notwithstanding the verdict that the Court must consider the evidence in the light most favorable to the prevailing party. All reasonable inferences must be indulged and any *conflict* in the evidence must be resolved in favor of the prevailing party.

This does not mean that the Court must take a myopic view of the evidence or cut and paste from the record in order that isolated shreds may be bound together out of context to give credence to a finding which would be wholly unreasonable and unfounded when considered in the light of the whole evidence. This is pointed out in the case of *Engstrom v. Auburn Auto. Sales Corp.* (1938), 11 Cal. (2d) 64, 77 Pac. (2d) 1059. In that case a directed verdict in favor of defendant was affirmed on appeal. It will be noted that the Court in that case did not restrict itself to a

consideration of plaintiff's evidence, but relied upon the uncontradicted testimony of defendant's witnesses in holding as a matter of law that the inference of permissive use was dispelled.

Justice Shenk, speaking for the Supreme Court, in *Estate of Lances* (1932), 216 Cal. 397, 14 Pac. (2d) 768, points out that the function of a trial Court on a motion for directed verdict or judgment notwithstanding the verdict is the same as that of a reviewing Court in determining whether there is evidence to support a verdict.

Appellee does not dispute that conflicts are to be resolved in favor of the prevailing party. A Court can hardly resolve a conflict if the evidence of the opposing party is not to be considered. As was pointed out in *Estate of Burns* (1938), 26 Cal. App. (2d) 741 at 743-744, 80 Pac. (2d) 77:

“The expression, ‘disregarding conflicting evidence’ obviously means to disregard only the fact that there is a conflict in the evidence and give full credit only to that portion of the evidence, whether produced by plaintiff or defendant, which tends to support the allegations contained in plaintiff’s complaint.”

We know of no case which has modified or overruled the rules announced by the above authorities. The case of *Chakmakjian v. Lowe* (1949), 33 Cal. (2d) 308, 201 Pac. (2d) 801, far from restricting the rule of the *Engstrom* case, cites it with unqualified approval.

The case of *Nash v. Wright* (1947), 82 Cal. App. (2d) 467, 186 Pac. (2d) 686, relied on so heavily by

appellee, is a decision of the District Court of Appeal and thus cannot be said to modify or overrule the *Engstrom* case, a decision of the Supreme Court, particularly in view of the later decision in *Chakmakjian v. Lowe*, supra, a Supreme Court case, which gives its unqualified approval to the *Engstrom* case.

The teaching of these cases is quite clear. A conflict in the evidence will be disregarded, but evidence which does not *conflict* with the evidence of plaintiff, but which *controverts the ultimate facts* sought to be established by plaintiff's evidence and cannot rationally be disbelieved will be given full credit. This is pointed out in the case of *Blank v. Coffin* (1942), 20 Cal. (2d) 457, 126 Pac. (2d) 868, in the portions quoted by appellee at pages 30 to 32.

(b) The evidence was insufficient to support a finding of permissive use.

The evidence relied upon by appellee to support the jury's implied finding in this regard consists of isolated facts appearing in the record. Appellee points out the ownership of the car by Mr. Mehlin, the marriage relationship between Mr. and Mrs. Mehlin and the fact that Claggett had the express permission of Mrs. Mehlin. In addition she relies upon certain "admissions" made, not by the parties involved, but by the agents of appellant, to wit, statements of Dennis respecting coverage; statements of Gripenstraw respecting permissive use; the admission of permissive use contained in Claggett's first answer, and a purported admission implied from language to be found in the affidavit of Paul C. Dana. (Appellee's

brief, pp. 20 to 28.) Appellee completely ignores the uncontradicted evidence which qualifies and explains and fills in the true picture respecting these circumstances. This evidence may be summarized as follows: (It is extremely important to consider the fact that all of this following evidence is uncontradicted; that no attempt was made by appellee to dispute it by direct testimony, or otherwise, and that it does not *conflict* or tend to disprove any of the above factual circumstances, but is perfectly consistent with their truth, and, therefore, cannot be said to be in conflict with them. It does, however, conclusively rebut the ultimate fact of permission sought to be established by appellee, by way of confession and avoidance, so to speak, by filling in the facts necessary to give the true picture.) This evidence showed that Mrs. Mehlin had her husband's permission for general domestic use of the automobile in and about the City of Lincoln (and not the unrestricted right to use the automobile as appellee would have it); that she took the automobile, her small son, and two strange men, deserted her husband and departed for California without his permission, with the intent to separate permanently from him and remain permanently in California. Two weeks *before* the accident occurred Mr. Mehlin swore out a warrant for his wife's arrest. When Mrs. Mehlin was first interviewed by Dennis she made a positive misrepresentation by stating that she had merely come to California on a visit, thus giving the impression that the venture had her husband's blessing. *Every so-called admission of appel-*

lant, or its agents, relied upon by appellee was made at a time when the true facts regarding Mrs. Mehlin's desertion were unknown to appellant, or its agents, and while they were still relying on the truth of the representations made by Mrs. Mehlin to Dennis. When the true facts were ascertained a course of conduct consistent with the discovery was immediately embarked upon. The original answer was withdrawn and an amended answer was filed. The defense was asserted, a reservation of rights was immediately taken from Claggett and appellee was notified of the facts.

Appellee offered no evidence which conflicted in any way with these proven facts. This same evidence contradicts no single *fact* proved by appellee, but effectually disposes of any inference of permission by disclosing the whole situation rather than isolated circumstances.

The situation is similar to a case where plaintiff seeks to recover for assault and proves that defendant struck him. Defendant proves that, at the time, plaintiff was engaged in robbing defendant at the point of a gun, a fact which plaintiff makes no attempt to disprove. We doubt if even Mr. Castro would seriously claim that an Appellate Court would be foreclosed from considering evidence such as this. The parallel between the evidence outlined above and the evidence discussed in the case of *Engstrom v. Auburn Auto. Sales Corp.*, supra, is unmistakable and is (we submit) determinative.

- (c) The fact that Claggett had express permission of Mrs. Mehlin is of no consequence as to the issue of initial permission.

At page 22 appellee cites two cases (*Souza v. Corti* (1943), 22 Cal. (2d) 454, 139 Pac. (2d) 645; and *Haggard v. Frick* (1935), 6 Cal. App. (2d) 392, 44 Pac. (2d) 447). As appellee's own statement points out, there was no question respecting the *initial* permission in those cases. They are of no aid, therefore, where, as here, initial permission is absent.

- (d) The so-called "admissions" of coverage and permission by insurer are not evidence of the alleged fact of permission and cannot be so considered.

As pointed out at pages 23 and 24 of appellee's brief certain agents of appellant uttered certain statements respecting coverage and permission in the instant case. As noted above these were admittedly made at a time when neither appellant nor its agents who made the statements had any knowledge concerning the true facts of Mrs. Mehlin's departure, but were, in fact, acting in reliance on her representations. Appellee introduced no evidence to show that any of the persons uttering these so-called admissions had any authority to bind appellant. In the absence of such evidence this testimony cannot be considered as evidence in support of the allegations of permission.

Guberman v. Weiner (1935), 10 Cal. App. (2d) 401, 51 Pac. (2d) 1141.

Appellee, of course, cannot claim that the declarations of the agents themselves were competent to estab-

lish this authority (even if their testimony were susceptible of this interpretation) since the rule requires that other evidence must establish this agency, and its scope.

See:

Brown v. Spencer (1912), 163 Cal. 589, 126 Pac. 493.

With respect to the supposed admission contained in the original answer of Claggett, appellee at pages 24 through 26 of her brief argues strenuously that this was evidence of the fact of permissive use. As we pointed out at page 26 of our opening brief, statements in abandoned or superseded pleadings cannot be used as evidence of the fact. Appellee attempts to distinguish the cases of *Kambourian v. Gray* (1947), 81 Cal. App. (2d) 783, 185 Pac. (2d) 27; *Gajanich v. Gregory* (1931), 116 Cal. App. 622, 3 Pac. (2d) 389, and *Weissbaum v. Eibeshutz* (1930), 211 Cal. 170, 294 Pac. 396, by pointing out that in each of those cases the pleading was used only for impeachment. As a reading of these cases will disclose, that fact was the very fact upon which the Court in each case held that no error was committed. Each case states that an attempt to utilize such a statement for any other purpose would be error. The case of *Coward v. Clanton* (1889), 79 Cal. 23, 21 Pac. 359, cited by appellee is in no way inconsistent with the holdings of any of the foregoing *later* cases. The cases of *Tieman v. Red Top Cab Co.* (1931), 117 Cal. App. 40, 3 Pac. (2d) 381, and *Dolinar v.*

Pedone (1944), 63 Cal. App. (2d) 169, 146 Pac. (2d) 237, an examination will disclose, do not involve abandoned or superseded pleadings.

The above pleading was admittedly admissible for impeachment. Appellee here attempts to capitalize on the fact that no objection was made below to limit its effect. Appellant, of course, realized that it was admissible for its limited purpose and, therefore, did not object on the trial. We do not read the authorities cited by appellee as holding that we are now foreclosed from urging that it should be given no more than its proper effect. The case of *Holzer v. Read* (1932), 216 Cal. 119, 13 Pac. (2d) 697, involved the failure to move to strike an unresponsive answer. Its application to these facts is difficult to see. The case of *Goode v. Smith* (1859), 13 Cal. 81, did not involve a question of admissibility for a limited purpose at all, but was concerned with the failure to object to evidence wholly improper. The same is true of the cases of *Riverside Rancho v. Cowan* (1948), 88 Cal. App. (2d) 197, 198 Pac. (2d) 526; *Ingraham v. Smith* (1948), 83 Cal. App. (2d) 807, 189 Pac. (2d) 721 and *Hatfield v. Levy Bros.* (1941), 18 Cal. (2d) 798, 117 Pac. (2d) 841.

The attempt of appellee to base an inference upon the facts stated in the affidavit of Paul C. Dana (appellee's brief pages 26 to 28) is, we submit, a resort to speculation. Appellee finds herself in the rather strange position of relying on an inference to be drawn from evidence which she claims is im-

proper, or at least to be limited only to the question of waiver and estoppel. We do not think it is reasonable to accord to this affidavit, which was submitted in support of appellant's motion for leave to file an amended answer, any more weight as an admission of permission than the so-called admission contained in the original answer itself.

(e) The presumptions of obedience to the law and innocence of wrong may not here be invoked by appellee.

Appellee calls to her aid at pages 28 and 29 of her brief the statutory presumptions that the law has been obeyed and that a person is innocent of wrong. The cases of *Prickett v. Whapples* (1935), 10 Cal. App. (2d) 701, 52 Pac. (2d) 972 and *Lanfried v. Bosworth* (1941), 45 Cal. App. (2d) 408, 114 Pac. (2d) 406, lend some color of support to this claim. These cases, however, decisions of the District Court of Appeal, are (we submit) not to be relied upon in this connection. In the *Prickett* case there was no petition for a hearing by the Supreme Court. Neither case has been cited nor approved with reference to their holdings in this connection by any other case since decided. The case of *Bradford v. Sargeant* (1933), 135 Cal. App. 324 (approved in *Engstrom v. Auburn*, supra) is in flat contradiction to the rules announced in the *Prickett* and *Lanfried* cases. The case of *Nash v. Wright*, supra, merely observes that plaintiff's proof is aided by these presumptions, but does not hold that the presumptions will support a finding of permission in the absence of other proof.

We have read the case of *Souza v. Corti* (1943), 22 Cal. (2d) 454, 139 Pac. (2d) 645, in its entirety and fail to discover wherein these presumptions are even mentioned.

The case of *Vaughn v. Jonas* (1948), 31 Cal. (2d) 586, 191 Pac. (2d) 432, was an assault case and cannot be said to be of aid to appellee here where permissive use is the issue.

That the *Prickett* and *Lanfried* cases are unreliable authority for the proposition that these presumptions can support a finding of permissive use in the absence of other evidence is demonstrated by the numerous cases holding that mere evidence of ownership standing alone does not raise an inference of permissive use.

Stewart v. Norsigian (1944), 64 Cal. App. (2d) 540, 149 Pac. (2d) 46;

Engstrom v. Auburn Auto. Sales Corp., supra;
diRebaylio v. Herndon (1935), 6 Cal. App. (2d) 567;

Krum v. Malloy (1943), 22 Cal. (2d) 132;

Barcus v. Campbell (1949), 90 Cal. App. (2d) 768, 204 Pac. (2d) 65;

Helmuth v. Frame (1941), 46 Cal. App. (2d) 381.

(f) Appellee's "proof" and any inferences arising therefrom were conclusively rebutted by appellant's evidence.

At pages 29 through 33 of her brief appellee argues that appellant's proof was insufficient to overcome any inference of permissive use and was insufficient

to rebut as a matter of law her so-called proof that Claggett was using Mr. Mehlin's automobile with his permission and consent. As above pointed out the Court in determining this issue must consider the whole evidence, resolving conflicts, to be sure, in appellee's favor, but not blinding its eyes to uncontradicted evidence which dissolves an inference technically permissible from the bare facts established by appellee. As we have pointed out above, the only evidence of the fact of permission established that Mr. Mehlin owned the car; that Mrs. Mehlin took the car to California; and that Mrs. Mehlin gave Claggett express permission to use it on the occasion in question. The various so-called admissions do not carry this proof any further since they cannot be considered as evidence of the fact of permission.

We concede, *arguendo*, that an inference of permission might be drawn from the facts of Mrs. Mehlin's possession, plus the fact of her marriage to Mr. Mehlin.

The uncontradicted evidence, however, which discloses the true circumstances of Mrs. Mehlin's taking, repels and rebuts any such inference of permission. Inferences may be drawn from the evidence only when it is reasonable to do so. We often hear the statement that an Appellate Court when considering the sufficiency of the evidence cannot weigh it or pass on the credibility of witnesses. This contention was effectually answered in the case of *Montanya v. Brown* (1939), 31 Cal. App. (2d) 642, 88 Pac. (2d) 745. At page 647 it states as follows:

“Respondents also contend that the application of the Engstrom case rule to a state of facts such as we have here, would amount to an invasion by the reviewing court of the right of the jury to pass upon the credibility of the witnesses; and that in any event said rule should not be applied where, as here, the rebuttal testimony is given by interested parties. We are of the opinion that there is no merit in either point.”

Particularly germane to the instant case is the Court’s observation at page 72 of its opinion in the *Engstrom* case:

“This undisputed testimony precludes any attempt to infer that Silkman’s use of the car was a permissive one. Appellant’s argument if carried to its logical extreme would permit an inference of permissive use from ownership alone even in the face of uncontroverted proof that at the time of the accident the car was being operated by one who had stolen it.”

So in the case at bar it would be manifestly unreasonable to infer permissive use in Mrs. Mehlin from the sole fact of Mr. Mehlin’s ownership and her possession, plus the fact of their marriage, in the face of the uncontroverted proof that she took the car without his permission, deserted him, and ran off to California with two strange men, intending to remain there.

The case of *Engstrom v. Auburn Auto. Sales Corp.*, supra, is on all fours with the instant case in its

application of these rules to a similar set of facts. There, as here, the defendant's evidence in no material respect conflicted with that of the plaintiff, but rather enlarged the picture and painted the whole situation in its true light rather than in the limited sense to which plaintiff attempted to restrict it. In the case at bar there was no evidence offered by appellee to contradict or rebut the testimony which disclosed the true circumstances of Mrs. Mehlin's taking.

Appellee argues that the testimony of Mr. and Mrs. Mehlin could be disbelieved because of their interest in the case. That contention was advanced and disposed of by the Court in the portions above quoted from the case of *Montanya v. Brown*, supra.

Further it is difficult to determine what their interest was at the time their testimony was given. They were never served in Mrs. Porter's suit and at the time their depositions were taken, that law suit had been tried to judgment. At that time they were in no way involved and any question of possible personal liability in that connection had been resolved in their favor.

It is claimed by appellee that the *Engstrom* case has been restricted to a considerable degree. We are unable to discover any case which so restricts it. The case of *Nash v. Wright*, supra, attempts to explain it. However, this, a decision of the District Court of Appeal, cannot be said to restrict or modify the Supreme Court's decision in the *Engstrom* case, as we have pointed out above.

At page 36 of her brief, appellee cites six cases which it is claimed restrict the rule of the *Engstrom* case. An examination of these cases will disclose that not one questions the soundness of the *Engstrom* case, but that, rather, each held its rule inapplicable under the facts of the particular case. Appellee's very statements of the facts purporting to distinguish the cases discussed by her on pages 37 and 38 disclosed their similarity and applicability to the case at bar.

IV.

AS A MATTER OF LAW THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH WAIVER OR ESTOPPEL.

The second ground relied on by appellee below and in this Court to support the judgment in her favor is that of waiver and estoppel, allegedly arising by virtue of the conduct of various agents of appellant and its attorneys between the time of the accident and the date when settlement negotiations were broken off in January of 1948. At the outset, the vital fact should be noted and borne in mind throughout that this conduct involved negotiations and communications between appellant and the attorneys for appellee. Without exception every case relied upon by appellee to support the claim of waiver and estoppel involves conduct as between the insurer and *its insured*. There is no evidence in this record respecting representations or conduct indicating a waiver or estoppel on the part of appellant as be-

tween itself and either the Mehlin's or Claggett. We are cited to no case by appellee and we have discovered none in which it is held that an insurer's duties toward a claimant against its insured are identical with its duties to the insured himself. Appellee's contention thus proceeds in the absence of a major premise.

No doubt with this missing essential in mind, appellee at pages 38 through 40 of her brief cites numerous authorities to support the substitute contention that she is a beneficiary under Mr. Mehlin's policy. In support of this proposition the cases of *Bachman v. Independents Indemnity Company* (1931), 112 Cal. App. 465, 297 P. 110, and *Panhans v. Associated Indemnity* (1935), 8 Cal. App. (2d) 532, 47 P. (2d) 791 are cited. As pointed out in the case of *Hynding v. Home Accident* (1932), 214 Cal. 743 at 748, the statements to this effect in the *Bachman* case are dictum and unnecessary to the decision. It further points out at page 750 that the case of *Malmgren v. Southwestern Insurance Company* (1927), 201 Cal. 29, 255 Pac. 512 upon which the decision in the *Panhans* case was based, was greatly restricted in its scope by the federal decision of *Metropolitan v. Colthurst* (1936), 36 Fed. (2d) 559. These views announced in the *Hynding* case were reaffirmed in the case of *Purefoy v. Pacific Automobile*, 5 Cal. (2d) 81. See also *Western Machinery Company v. Bankers Indemnity*, 10 Cal. (2d) 488; *Valladao v. Fireman's Fund*, 13 Cal. (2d) 322 and *Vanderhoof v. Chambon*,

121 Cal. App. 118, for further expressions of the California Courts to the effect that a third party claimant is not a third party beneficiary in the legal sense of that term and that such a claimant's rights are derivative only, and are no greater than the rights of the person through whom the claimant seeks the benefit of the policy.

We are unable to discover anything in the cases of *Souza v. Corti* (1943), 22 Cal. (2d) 454, 139 P. (2d) 645; *Bayless v. Mull* (1942), 50 Cal. App. (2d) 66, 122 P. (2d) 608; or *Burgess v. Cahill* (1945), 26 Cal. (2d) 320, 158 P. (2d) 399, which conflicts with these views. It is difficult to see why appellee cites them since no coverage question was involved in any of them.

Appellee's attempt to constitute herself a party to the insurance contract in order to invoke in her behalf the duties of an insurer to its assured thus falls to the ground.

We do not quibble with appellee's definitions and distinctions concerning waiver and estoppel. The elements constituting each are too well settled in the law of this and every state. Nor do we quibble with the general proposition that constructive knowledge may be sufficient to establish a waiver or estoppel. We *are* concerned with the fact that the evidence adduced to support the claim of waiver and estoppel does not in fact establish either and is legally insufficient to do so.

We refer to the rule discussed above in connection with the scope of review on this appeal where the

sufficiency of the evidence must be considered. In that connection we refer to the evidence as a whole and rely on that evidence which is uncontradicted and which is not in conflict with any evidence produced by appellee.

As appellee herself points out, waiver cannot be established without a showing of knowledge and intent to waive (see appellee's brief pages 40 through 42). It is argued that actual knowledge of a policy defense of appellant is shown by the evidence. Care should be taken in examining the facts to consider them in their proper sequence. All of the conduct relied upon by appellee to establish waiver and estoppel took place between the time of the accident and the time, in January of 1948, when settlement negotiations were broken off. It is argued that by virtue of the assumption of Claggett's defense, the filing of an answer on his behalf, the admission contained in that answer (later withdrawn and amended) and the statements of appellant's various agents and their conduct of settlement negotiations, an intent to waive is indicated. Appellee makes this argument with a perfectly straight face and full in the teeth of the uncontradicted evidence which established that neither appellant nor any of its agents or attorneys, at that time, either knew or had reason to suspect the true circumstances of Mrs. Mehlin's taking of the car and desertion of her husband. Where the uncontradicted evidence shows that appellant had no knowledge of a policy defense it is indeed difficult to see how this evidence can establish an intent to waive the unknown

defense. Indeed, appellee assumes at page 45 of her brief, as a premise of her argument that the insurer had full knowledge of the facts entitling it to assert its defense. The fact that appellant's actions may have been inconsistent with an intent to enforce a right can be of little consequence where the existence of the right was unknown.

Appellee argues that appellant had constructive knowledge of its policy defense, i.e., had knowledge of facts and circumstances sufficient to put a prudent man on inquiry and is thus charged with knowledge of the facts which such inquiry would have disclosed. Reasonable minds (we submit) could draw no such intendment from the evidence. Appellee points out that at the time of the accident, which occurred in California, Claggett was driving the automobile, that Claggett had the express permission of Mrs. Mehlin to drive it, and that Mr. Mehlin at the time was in Lincoln, Nebraska, and was unacquainted with Claggett. Again appellee ignores the uncontradicted evidence which fills out and completes this evidence, i.e., that Adjuster Dennis, employed by appellant, interviewed Mrs. Mehlin and was informed by her *that she was on a visit to California*. Surely nothing could be more natural than this, and surely no statement was better calculated to forestall further inquiry into the circumstances surrounding the presence or absence of initial permission. The statement of Mrs. Mehlin simply confirmed what would be a natural assumption—that a wife's presence away from her home was with the consent of her husband. At

page 28 of her brief, appellee lays great stress upon the presumptions of innocence and obedience to the law. She is, in effect, hoist on her own petard when, in discussing constructive notice, she urges in effect that a prudent person would be put on notice by circumstances which would only seem to accord with these presumptions. Surely appellant was entitled to assume, in view of Mrs. Mehlin's statement, that she was innocent of wrong. It would, indeed, be ridiculous to require an insurer in every instance to presume that its insured was a liar and a fugitive from justice as well as a deserter of the home in order to avoid being saddled with the consequences of a holding that it had constructive knowledge of any such extraordinary state of facts.

The case of *Shapiro v. Equitable* (1946), 76 Cal. App. (2d) 75, 172 P. (2d) 725, did not involve a similar problem, but was concerned with whether plaintiff could claim lack of discovery of a fraud for purposes of tolling the statute of limitations. There plaintiff applied for a policy loan and first made inquiry *eight years* after the application as to why the money was not forthcoming. It was held that he thus had constructive notice of the agent's fraud. The case of *Northwestern P. C. Co. v. Atlantic P. C. Co.* (1917), 174 Cal. 308, 163 P. 47, gives scant comfort to appellee here. It was there held, even where a pledgee of stock knew that the pledgor held the stock as trustee, that the trustee was in financial difficulty and that the trustee wished the pledge kept secret, that the pledgee still did not

have constructive notice of the pledgor—trustee's fraud and was not required to make inquiry. The case of *Baxter v. National Mortgage Loan Co.* (1935), 128 Neb. 537, 259 N.W. 630, simply points out that one "cannot shut his eyes where he *knows* that *irregularities* have occurred".

As the *Baxter* case goes on to point out:

"* * * the loan company had no actual knowledge as to the source of the funds from which the three checks were actually paid save as may be imputed to it due to the fact that Rolland F. Ireland, then attorney in fact for Baxter, was at the same time the secretary-treasurer and managing officer of the loan company.

It would seem that the case of *State v. Farmers and Merchants Bank*, 112 Neb. 840, 201 NW 897, would negative imputed notice under the facts in this instant case."

See also *American Fire Insurance Company v. Landfare* (1898), 56 Neb. 482, 76 N.W. 1068 at 1070, where the Nebraska Court rejected the constructive notice theory.

Appellee attempts to distinguish cases cited by appellant on the ground that in each, the insured either made a positive misrepresentation of a material fact, or that the insurer had no knowledge of an alleged breach. Far from distinguishing these cases, these fact place them on all fours with the instant case, where Mrs. Mehlin made a positive misrepresentation concerning the nature of her visit to California and

the insurer was in ignorance of the true facts until long after settlement negotiations were broken off and an answer on behalf of Claggett filed. The fact that appellant, as soon as it obtained knowledge, immediately took a reservation of rights and notified appellee of its defense further serves to identify this case with those purportedly distinguished by appellee.

In connection with its claim that an estoppel was worked appellee argues that she was misled to her detriment, (or at least her attorneys so claim), at pages 54 to 57 of her brief. It is indeed difficult to spell out any misleading or detriment in the evidence. It is claimed that appellee lost the right to properly appraise the settlement offers. We think this Court will not look with favor upon the claim of appellee that she suffered detriment because she was not permitted to take advantage of a settlement offer made in ignorance of the true facts. The inference to be drawn from this argument is that appellee would have snapped up appellant's settlement offer had she been aware of the true facts. As counsel for appellee surely know, such an offer would never have been made had the true facts been known to appellant. We do not thus think it lies in the mouth of appellee to say that detriment was suffered because she lost the opportunity to secure the payment of money through mistake as to a material fact. This item of claimed detriment is manufactured out of whole cloth. We are cited to no case, significantly enough, which gives credence or support to this hollow contention.

Appellee argues that the trouble and expense of prosecuting the death action constituted legal detriment. The inference to be drawn from this statement is that appellee's attorneys do not accept cases where the prospective defendants are not covered by insurance. Whether or not a death action was to be filed was a matter to be determined by the merit of the facts in that case (we submit). In any event, we fail to see how appellee was prejudiced by the filing of an action which resulted in a judgment in her favor of \$30,000. There was no evidence offered to prove Claggett was insolvent. Surely her claim of detriment is chimerical in the extreme.

The case of *Home Fire Insurance Co. v. Kennedy* (1896), 47 Neb. 138, 66 N.W. 278, is of no aid to appellee in this connection. In that case, with knowledge of the facts constituting its defense, the company nevertheless required the plaintiff to file numerous technical proofs of loss. The time and expense thus consumed at the company's insistence was held to be sufficient detriment. In the case of *Continental Casualty Company v. Curtis*, 94 F. (2d) 710, the company, with full knowledge of its policy defense, withheld disclaimer until after the decision of the personal injury action and did not raise it until its answer was filed in the suit on the policy. By that time the fact witnesses had disappeared and it was held that this detriment was sufficient. In the instant case appellee was notified of the defense *before* the death action and afforded an opportunity to continue

the trial. Appellee not only declined this opportunity, but vigorously resisted appellant's motion for continuance and insisted that the matter proceed to trial. We think it does not lie in her mouth now to claim that she was misled and prevented from conducting a proper investigation where she waived the opportunity to do so. It is further difficult to see how appellee would have secured the full cooperation of Claggett, when Claggett was an adverse party to the death action and represented by counsel. There is no indication or evidence that appellee would have followed any other course had the policy defense been known to all parties from the inception of the dealings between her attorneys and appellant.

V.

THE OMNIBUS CLAUSE IN APPELLANT'S POLICY WAS NOT SUBJECT TO WAIVER, AND COVERAGE UNDER ITS TERMS COULD NOT BE EXTENDED BY THE DEVICES OF WAIVER AND ESTOPPEL.

As pointed out in our opening brief (page 41 *et seq.*) it is necessary to draw a distinction, when dealing with waiver and estoppel, between cases involving a prohibition or condition, breach of which *voids* a policy or causes a *forfeiture*, and the situation where, as here, one is attempting to extend coverage to a person not named in the policy. The omnibus clause here extended the protection of the policy under certain conditions, i.e., it extended coverage to anyone operating the automobile with the permission

of the named insured, Mr. Mehlin. *There could be no breach of this provision.* If this were not true Mr. Mehlin would breach his policy by not giving permission to every person who drove the automobile. Such a contention would be manifestly absurd. The fact that no permission was given, therefore, did not void the policy. The policy continued in full force and effect. Because of the absence of permission, however, its coverage was not extended to Claggett.

As pointed out in our opening brief under the authorities there stated, there can be no waiver or estoppel which will extend coverage in this manner, *after the facts have occurred and the rights of the parties are fixed*, so as to extend coverage or make a new contract. Waiver and estoppel, when dealing with a breach which has occurred *before* the circumstances constituting the waiver and estoppel, can be invoked only to prevent the declaration or enforcement of a forfeiture for breach of a prohibition in the policy.

Appellee, at page 47 of her brief, has cited five cases as authority for the proposition that coverage under an omnibus clause can be extended by means of waiver and estoppel. None of these cases is either a California or a Nebraska decision and the strength of their authority in view of the cases we cite below is therefore extremely questionable. It should be observed, however, that in the case of *Virginia Automobile Insurance v. Brillhart* (1948), 187 Va. 336, 46 S.E. (2d) 377, omnibus coverage was discarded

as a basis for the decision and the Court based its holding upon a finding that the agent had accepted on behalf of the company an oral assignment of the policy. In the cases of *Snedker v. Derby Oil* (1948), 164 Kan. 640, 192 P. 135; *Peterson v. Maloney* (1930), 181 Minn. 437, 232 N.W. 790; and *Horn v. Commonwealth* (1929), 105 N.J.L. 616, 147 Atl. 483, the trial Court in each case had found as a fact that there had been permission. Accordingly, each decision was sustainable on that ground and in each decision the holding relative to omnibus coverage by virtue of waiver and estoppel was unnecessary to the decision.

We disagree with appellee's argument at pages 59 to 60 that a new risk was created. The identity of the named insured and the persons to whom he might trust his car have considerable bearing on the writing of the risk. A non-permitted taking and removal of the vehicle extends the risk to undesirable persons as well as to undesirable places. We think it is self-evident that the risk is increased when the car is entrusted to one who is, in effect, the permittee of a thief.

However this may be, the fact that a new risk was or was not created is immaterial to the issues here under consideration. Appellant does not have to establish an increase of risk under the omnibus clause in order to avoid liability where no permission was given. *Sears v. Illinois Indemnity Company*, 121 Cal. App. 211; *Boole v. Union Marine Ins. Company*, 52 Cal. App. 207; *Home Indemnity Company*

v. Standard Accident Ins. Company, 165 Fed. (2d) 919.

Appellee has cited numerous Nebraska and California cases in support of her contention that resort may be had to the doctrines of waiver and estoppel to extend coverage here. An examination of these cases discloses that, with the exception of two cases discussed below, *every single case* involved a policy provision breach of which rendered the policy null and void and resulted in a forfeiture. Forfeiture cases such as these are inapplicable to the case at bar.

The distinction between forfeiture cases and cases in which it is sought to extend coverage is pointed out in two companion cases cited by appellee, those of *Reid v. Northern Assurance Company* (1923), 63 Cal. App. 114, 218 P. 290, and *Steil v. Sun Insurance Office* (1916), 171 Cal. 795, 155 P. 72. These cases dealt with policies which covered certain goods while kept in a certain building. A loss of these goods while they were out of the building was not covered by the policy. The goods were in fact removed to another building where they were destroyed by fire. As pointed out by the Court in the *Steil* case at page 802, removal of the goods neither forfeited nor voided the policy. At page 800, the Court held:

“In order to continue the insurance upon the goods, or in other words, to carry it to the goods in the new location, something more was required than a mere notification by the insured to the insurer of the fact that the goods were or were

about to be removed. That fact would only *suspend* the insurance risk. The insurer must be informed or be given good cause to believe that the party insured desired to have the insurance on the goods continued in the new place, that he wished a modification of the policy to make it cover the goods in the new location and must then by positive act or by failure to act, cause the insured to believe that the insurer consented to such transfer or modification and that the goods were covered by the policy. Something in the nature of a *new agreement*, either express or implied from the conduct or condition or created by estoppel was necessary." (Emphasis added.)

The *Reid* case dealt with a re-trial of the same set of facts and accepts the opinion of the *Steil* case as the law of the case. The evidence developed the fact that at the time the goods were removed, the company was notified and requests for approval of transfers were received over the telephone and accepted, i.e., that a *new contract of insurance* had been entered into. In other words, the defendant was held estopped to deny that it had made a new contract of insurance. *It was not contended, nor was it held that the policy covering the goods in their old location extended coverage to the goods in their new location.* With reference to the estoppel point, it was merely held that the company was estopped to deny that the formal requisites regarding writing, etc., were not complied with.

Indeed, with respect to one cause of action where the evidence was not sufficient to establish that a new contract of insurance was entered into, it was held that no estoppel was worked since coverage under the old policy could not thus be extended.

In the case at bar, the insurance contract and its provisions remained unchanged and unmodified throughout. With the exception of the prohibition regarding the declaration as to the place of principal use, which we discuss below, there were no breaches of its conditions. Waiver and estoppel thus are of no avail to appellee in order to extend coverage under the omnibus provision where the facts establish that its terms were not fulfilled.

VI.

THE PROVISIONS OF THE POLICY AGAINST WAIVERS EXCEPT IN WRITING COULD NOT BE WAIVED UNDER THE FACTS OF THIS CASE, AND PREVENT THE EXISTENCE OF WAIVER.

Appellee cites numerous Nebraska and California cases to the effect that a non-waiver clause cannot prevent a waiver, i.e., that a non-waiver clause itself may be waived. Again the distinction between breach of provisions which void or forfeit a policy and attempts to extend coverage under a perfectly valid provision of the policy must be drawn. Those cases which hold that such a provision may be waived upon inspection will be seen to deal with the waiver by a company of its right to declare a *forfeiture* for

breach of a provision which renders the policy *void*. It should further be noted that in many of the cases cited by appellee no non-waiver clause was involved. Indeed, it is difficult to see why appellee cites them in this connection. See *Hunt v. State Insurance Company* (1902), 66 Neb. 121, 92 N.W. 921; *German Insurance Company v. Shader* (1903), 68 Neb. 1, 93 N.W. 972; *German Mutual v. Palmer* (1902), 63 Neb. 688, 92 N.W. 624; *Knarston v. Manhattan Life* (1899), 124 Cal. 73, 56 P. 773; *Grant v. Sun Indemnity Co.* (1938), 11 Cal. (2d) 438, 80 P. (2d) 996.

The case of *Hartford Fire Ins. Co. v. Landfare* (1902), 63 Neb. 559, 88 N.W. 779, far from being of comfort to appellee recognizes that the policy provisions against waiver except in writing are binding.

The remaining California cases stem from the decision in *MacIntosh v. Agricultural Fire* (1907), 150 Cal. 440, 89 P. 102. This case points out that as respecting *past* conduct of the company the non-waiver provisions are perfectly valid. The case, however, holds that with respect to *future* actions and *future* operations such non-waiver provisions can be waived. At page 47 of the decision, it is said:

“The doctrine is well settled that such stipulations and limitations in a policy regarding the powers of agents and the manner of waiving its conditions do not preclude a waiver by the conduct of authorized agents in regard to *future* operations on the premises”.

The cases of *Raulet v. Northwestern* (1910), 157 Cal. 213, 107 P. 292, and *Reid v. Northern* (1923), 63

Cal. App. 114, 218 P. 290, simply affirm the rule of the *MacIntosh* case.

The distinction between these cases and the set of facts in the case at bar is perfectly clear. While the non-waiver clause might not prevent the waiver, as to future acts, of the limitations in the policy, the clause is effectual to prevent waiver, *after the facts have occurred and the rights of the parties are fixed*. But the argument of appellee begs the point, for it will be seen that these rules respecting non-waiver clauses are applied only in instances where a policy provision, breach of which voids the policy and declares it forfeit, was concerned.

At pages 73 and 74 of her brief, appellee argues that the evidence did not show that any of the agents of appellant had no authority to waive the provisions of its policy. Appellee, of course, had the burden of proof to establish coverage below. This argument thus merely serves to demonstrate appellee's failure of proof of this respect.

Appellee at page 75 argues that the reservation of rights executed by Claggett did not cure the waiver and estoppel. As pointed out above appellee has indicated no evidence to give rise to an estoppel or waiver as between Claggett and appellant. Since appellee's rights can rise no higher than those of the person through whom she claims—i.e., Claggett, and since there was no waiver or estoppel as to Claggett, it is difficult to see how she avoids the effect of a reservation of rights which binds him.

VII.

THE DECLARATION CONCERNING PRINCIPAL PLACE OF USE AND GARAGING OF THE VEHICLE WAS BREACHED WHEN THE WIFE BROUGHT THE VEHICLE TO CALIFORNIA WITH THE INTENTION OF REMAINING THERE.

Appellee places great reliance on the case of *Sutton v. Hawkeye Casualty Co.* (1943), 138 Fed. (2d) 681, decided in Sixth Circuit. That decision is not the law in California.

Appellee attempts to distinguish the cases cited in our opening brief on the ground that the policy in question did not state that the declaration was a warranty or that a change in garaging or use would void the policy. Such a statement was not necessary (we submit) since the insurance code of California gives that effect to the provision irrespective of the presence or absence of such a statement in the policy. (See Appellant's Opening Brief, pages 51 and 52. See also *Connecticut Indemnity Co. v. Howe*, 41 Fed. Sup. 222.)

It is claimed that this provision was waived. As we point out above the knowledge of appellant regarding the facts constituting this breach was limited and the fact that Mrs. Mehlin took the car to California with the intention of remaining there was not revealed until August of 1948, after the trial of the death action. The insufficiency of the evidence as to waiver of other policy provisions demonstrates its insufficiency to establish the waiver of a violation of this provision. Further the non-waiver clause referred to above prevented any such waiver after the rights of the parties became vested.

VIII.

CONCLUSION.

The propositions advanced by appellant in its opening brief and the authorities in support thereof are unshaken by anything to be found in the brief for appellee.

We respectfully submit that the judgment entered on the verdict should be reversed with the directions to the trial Court to enter judgment in favor of appellant.

Dated, San Francisco, California,
September 8, 1950.

MORTON B. JACKSON,
DANA, BLEDSOE & SMITH,
Attorneys for Appellant.

No. 12,531

IN THE
United States
Court of Appeals
For the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSUR-
ANCE COMPANY,

Appellant,

VS.

BERTHA LEE PORTER, Special Administra-
trix of the Estate of CHARLES E. PORTER,
deceased,

Appellee.

Petition for Rehearing

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SUBJECT INDEX

	Page
Facts Involved.....	1
Basis for the Affirmance.....	2
The Opinion of This Honorable Court Is Contrary to California Decisions, Contrary to a Decision of the United States Supreme Court, and Against Sound Reasoning. The Opinion Will Have Far-Reaching and Undesirable Effects.....	3
A. The Admission Contained in a Superseded Pleading Filed by Claggett's Attorney in the State Court Was Not Evidence That Could Be Used to Establish Permission	3
B. The Statement of Claim Adjuster Gripenstraw to Appellee's Attorney Could Not Be Relied Upon as a Binding Admission of the Fact of Permission.....	10
Certificate of Counsel.....	19

TABLE OF AUTHORITIES CITED

CASES	Pages
American Life Ins. Co. v. Mahone, 22 L.Ed. 593.....	14, 15
Berewicz v. Haglin, 115 N.W. 271.....	15, 16
Borland v. Nevada Bank, 99 Cal. 89 at 94.....	13
Brooks v. Brooks, 63 Cal. App.(2d) 671, 147 Pac.(2d) 417.....	6
Bueham v. Smelker, 68 Pac.(2d) 946 at 949.....	9
B & O v. Post, 15 Atl. 885.....	13
Caccamo v. Swanston, 94 C.A.(2d) 957.....	5
Coward v. Clanton, 79 Cal. 23, 21 Pac. 359.....	4, 6, 7
Dolinar v. Pedone, 63 Cal. App.(2d) 169, 146 Pac.(2d) 237.....	6
Engstrom v. Auburn Motors, 11 Cal.(2d) 64.....	15, 19
Gajanich v. Gregory, 116 C.A. 622.....	4
Jackson v. P. G. & E., 95 C.A.(2d) 204.....	8, 9
Jones v. Harris, 210 Pac. 22 (Wash.).....	16
Jones v. Tierney-Sinclair, 71 Cal. App.(2d) 366, 162 Pac.(2d) 669	6
Kambourian v. Gray, 81 C.A.(2d) 783.....	4
Kerver v. Virginia Chem., 145 F. 288 at 290.....	9
McNeil v. Dow, 89 Cal. App.(2d) 370, 200 Pac.(2d) 859.....	6
Mecham v. McKay, 37 Cal. 154.....	4, 5
Miles v. Woodward, 115 Cal. 308.....	8
Miller v. Lee, 66 C.A.(2d) 778.....	5
Packet Company v. Clough, 22 L.Ed. 406.....	13
Ralph v. Hensler, 114 Cal. 196.....	7, 8
Stephens v. Vroman, 18 Barb. (N.Y.) 250.....	16, 17
Taylor v. Bernheim, 58 C.A. 404, 209 Pac. 55.....	13
Tieman v. Red Top Cab Co., 117 C.A. 40, 3 Pac.(2d) 381.....	6

	Pages
Tognazzi v. Wilhelm, 6 Cal.(2d) 123 at 127.....	4
Traeger v. Friedman, 79 C.A.(2d) 151.....	5
Weissbaum v. Eibeshutz, 211 Cal. 170.....	4
Wilbur v. Emergency Hospital, 27 C.A. 751 at 759.....	14, 18

TEXTS

Wigmore, 3rd Edition, Sec. 1066, Note 2.....	7
Wigmore, Third Edition, Vol. IV, page 17, Section 1055.....	15

IN THE
**United States
Court of Appeals**
For the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSUR-
ANCE COMPANY,

Appellant,

VS.

BERTHA LEE PORTER, Special Administra-
trix of the Estate of CHARLES E. PORTER,
deceased,

Appellee.

Petition for Rehearing

*To The Honorable Justices of The United States Court of
Appeals, for the Ninth Circuit:*

The Appellant, State Farm Mutual Automobile Insurance Company, respectfully petitions for a rehearing on the following grounds:

FACTS INVOLVED

The Court has affirmed a judgment against the insurance company. The action was on an insurance policy of

Wilbur Mehlin's. Coverage on the driver of Mehlin's car was denied by the company. The questions involved were whether the company had waived or been estopped to assert policy defenses and whether the driver, Claggett, had Mehlin's permission to drive the car at the time and place of the accident.

BASIS FOR THE AFFIRMANCE

The Court, much to appellant's astonishment, has decided the case on a basis contrary to the opinion given by the trial judge. Despite the expressed opinion of the Honorable Trial Judge that there was no evidence of permission given by Mehlin to Claggett, this Court has ruled that there was evidence of sufficient weight to warrant a finding that permission was granted.

The Trial Court, in ruling against a motion for judgment notwithstanding the verdict, felt that waiver or estoppel had been established. This Court has not passed upon that aspect of the case at all. No one can tell whether the *jury* decided the case on the question of permissive use or on the basis of waiver and estoppel.

If, as a matter of law, there could be no finding of waiver or estoppel as a basis of coverage, then it would have been error for the trial court to have submitted those issues to the jury. Consequently, appellant is entitled to have this court pass on the question of waiver and estoppel as long as the Court feels that the jury could have found that permission was given. Appellant's case to the jury was prejudiced by the submission to them of questions upon which they could not legally predicate a verdict. The prejudice was brought into clear focus as soon as this Honorable Court ruled that the jury *could have* based its

finding on evidence of permission, even though the jury *might have* based its finding on the proposition of waiver or estoppel.

THE OPINION OF THIS HONORABLE COURT IS CONTRARY TO CALIFORNIA DECISIONS, CONTRARY TO A DECISION OF THE UNITED STATES SUPREME COURT, AND AGAINST SOUND REASONING. THE OPINION WILL HAVE FAR-REACHING AND UNDESIRABLE EFFECTS.

A. The Admission Contained in a Superseded Pleading Filed by Claggett's Attorney in the State Court Was Not Evidence That Could Be Used to Establish Permission.

This Court, in holding that the original answer could be used as evidence of the fact of permission (even though the answer had been amended to change an admission to a denial of permission), has gone counter to the established California rule and against the better reasoned decisions.

It is important to get a proper perspective of the evidence in this case in order to appreciate the enormity of the Court's ruling. The burden of proof that permission had been given was upon appellee; yet appellee offered *no direct evidence* that permission had been given. In addition, the positive and direct evidence was all to the contrary. Further than that, the direct evidence showed that the admission in the answer was made under a proved and previously established mistake as to the facts. We say "previously established" because the State Court had ruled that the answer could be amended on the showing made that there was a misapprehension concerning the true facts. The finding of the State Court is binding and conclusive. It is all the more conclusive when one considers that amendments to pleadings which change

an express admission to an express denial of a material fact are not allowed unless there is evidence that the party was "deceived or misled, or that his pleading was put in under a clear mistake as to the facts." *Tognazzi v. Wilhelm*, 6 Cal. (2d) 123 at 127.

The opinion of this Court seeks to distinguish the California cases of *Kambourian v. Gray*, 81 C.A. (2d) 783; *Gajanich v. Gregory*, 116 C.A. 622; *Weissbaum v. Eibeshutz*, 211 Cal. 170, and *Mecham v. McKay*, 37 Cal. 154 on the ground that a different rule prevails in cases where it is attempted to use a superseded pleading in the *same* case. Reference is then made to the case of *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359 where the use of a former pleading was allowed in a *different* case.

In the first place, we do not feel that there is any valid basis for a distinction to be drawn between the use of pleadings from the same case and from different cases. Indeed, this Court has stated that its decisions do not recognize any distinction (note 10, page 9, of the Opinion).

The real question is, how far does *Coward v. Clanton* go in allowing use of a *superseded* pleading to prove an admission of a fact? Does that case establish a broad and accepted rule allowing such proof? We believe not. It is important to note that in *Coward v. Clanton* from all that appears in the decision, the claim was made in the *second* cause between the parties that the prior answer was "superseded by the filing of another answer in *this* case." (Emphasis ours). It does not appear that the so-called superseded pleading in the previous action had been *amended* to change an admission to a denial upon proper showing of mistake and inadvertence. We respectfully submit that this Court has misread the purport of the

Coward case, and that the Coward case does not go as far in its holding as the opinion of this Court says it does.

The important difference should be noted in cases when the original pleading is merely *superseded* by another pleading which merely omits the prior statement, and one such as ours where the original pleading is *amended* in the same case in order to change an admission to a denial.

We start with *Mecham v. McKay*, 37 Cal. 154, wherein the California Supreme Court says:

“It has doubtless often happened that a pleading contains admissions made under a misapprehension of the facts. In such cases, if the party amends his pleading, stating the facts differently, he would reap no benefit from his amendment, if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading. It cannot be a sound rule of evidence which works such results and practically puts it out of the power of a party to avoid the effect of a mistake in the original pleading.”

We feel that the reasoning and same rule has been continually followed in California down to the present time. We feel that the rule is not to be applied differently in cases involving different lawsuits.

This Honorable Court has expressed the view that the standing of *Mecham v. McKay* has been put in question by the cases of *Miller v. Lee*, 66 C.A. (2d) 778; *Traeger v. Friedman*, 79 C.A. (2d) 151, and *Caccamo v. Swanston*, 94 C.A. (2d) 957. Not one of these cases mentions *Mecham v. McKay*. Not one of these cases involved the case of a superseded pleading that had been changed from an admission to a denial after a proper showing of mistake.

In quoting *Coward v. Clanton*, 79 Cal. 23, the footnote to this court's opinion states that the following cases are in accord: *Tieman v. Red Top Cab Co.*, 117 C.A. 40, 3 Pac. (2d) 381; *Dolinar v. Pedone*, 63 Cal. App. (2d) 169, 146 Pac. (2d) 237; *Brooks v. Brooks*, 63 Cal. App. (2d) 671, 147 Pac. (2d) 417; *Jones v. Tierney-Sinclair*, 71 Cal. App. (2d) 366, 162 Pac. (2d) 669; *McNeil v. Dow*, 89 Cal. App. (2d) 370, 200 Pac. (2d) 859.

In *Tieman v. Red Top* no reference is made to *Coward v. Clanton*. No superseded pleading was involved.

In *Dolinar v. Pedone* no superseded pleading was involved. There was a mere lack of denial of an allegation in a former action.

In *Brooks v. Brooks*, no amended pleading was involved. There was a mere conflict between present and prior allegations.

In *Jones v. Tierney*, an admission in a former pleading had not been superseded by amendment.

In *McNeil v. Dow* the admissions in a former pleading had never been changed by amendment. No superseded pleading was involved.

It can be seen therefore that neither *Coward v. Clanton* nor any of the other cases referred to by this Court in its opinion can be regarded as authority for the proposition that a pleading which has been *changed* by amendment in a former proceeding can be used as an admission in a subsequent action. This is particularly true when the change is allowed by the other tribunal to permit the destruction of the admission and set up a denial of it. Such a ruling cannot be collaterally attacked. Nor can any of the decisions referred to in this Court's opinion be re-

garded as authority for making a distinction between the *same* and *different* cases.*

Wigmore's appraisal of *Coward v. Clanton* is that the language therein is dicta. (Wigmore, 3rd Edition, Sec. 1066, Note 2.) As a matter of fact, Wigmore recognizes California as one of the jurisdictions which "excludes all common law pleadings filed in other causes." (3rd Edition, Section 1066, Note 2.)

Let us examine some California cases on the subject. Take for instance, *Ralph v. Hensler*, 114 Cal. 196, which holds that an admission is withdrawn by the amended pleading in the following language:

"This contention of appellant must be sustained. It was early held in the case of *Mecham v. McKay*, 37 Cal. 154, that an original pleading containing an admission against interest, which original pleading had been superseded by an amended pleading, could not be admitted in evidence against the pleader, and it was said: 'If the party amends his pleading stating the facts differently he would reap no benefit from his amendment, if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading.' This case has frequently been followed. (*Ponce v. McElvy*, 51 Cal. 222; *Pfister v. Wade*, 69 Cal. 133; *Wheeler v. West*, 71 Cal. 126.) Under the rule as thus laid down defendants' answer containing the admissions amounting to a ratifica-

*The only reason for making a distinction would lie in the fact that in the same case a change has been made and the superseded pleading has been eliminated, destroyed. In different proceedings, the pleading in the former action still exists as a valid pleading. It has not been changed. The allegation relied on still stands as a part of a valid subsisting pleading. In our case the former pleading has been nullified by an amended pleading *in the same case*—the State Court proceeding.

tion was superseded and ceased to be a subsisting pleading. Its declarations could not have been received or considered by the court."

In *Miles v. Woodward*, 115 Cal. 308, sound reasoning is applied as follows:

"5. Defendant's original answer had been superseded by an amended pleading. Over defendant's objections portions of his original answer containing admissions were admitted. This was error. (*Mecham v. McKay*, 37 Cal. 154; *Ralphs v. Hensler*, 114 Cal. 196.)"

To illustrate how the California Courts feel about permitting a superseded pleading (one actually amended) to be used as an admission and to point up the rather far reaching effect this Court's present opinion will have on future practice, we wish to quote to this Honorable Court from *Jackson v. P. G. & E.*, 95 C.A. (2d) 204:

"The province and purpose of the law is to ascertain the real facts and to administer justice in the light of such facts. It would seem to be a travesty on justice if a litigant had inadvertently, ignorantly and erroneously stated as a fact, without fault on his part, an admission against interest, if he were to become bound thereby and would not be permitted upon proper showing to correct the innocent error and assert the true fact in that regard. We do not concede that is the law. It has been held that when an original pleading contained an admission against interest, the filing of an amended pleading superseded the original one and that the original pleading could not be used as evidence or be considered by the court. (*Ralphs v. Hensler*, 114 Cal. 196 (45 P. 1062); *Miles v. Woodward*, 115 Cal. 308, 316 (46 P. 1076); 49 C.J. Sec. 773, P. 558; 41 Am. Jur. Sec. 313, p. 507.)"

“We think the correct rule with respect to reference to former pleadings which have been substituted by amended pleadings filed by leave of court is that the abandoned and substituted pleadings may be considered only for certain limited purposes, but not to bind the pleader to an untrue and erroneous admission against interest which was inadvertently contained therein, but which has been subsequently disavowed and corrected in an amended pleading filed by leave of court, in which, or accompanying which, satisfactory explanation is made of the reason which caused the original erroneous statement. Otherwise, it would be useless and futile to correct an innocent mistake of fact by stating the truth with respect thereto and explaining the cause of the erroneous statement. The primary function of our courts of justice is to ascertain the truth and real facts of a case and to administer justice accordingly. If courts were to bind litigants to inadvertent untrue statements of facts and forbid them the inherent right to correct the false by substituting the true facts, they would become partisans to miscarriages of justice. Our courts not only permit, but strive to elicit, the true facts of all cases, and to render justice by applying the law to such facts. That is the purpose and spirit of the provisions of section 473 of the Code of Civil Procedure, which reads in part:

‘The Court may, in furtherance of justice, allow a party to amend any pleading by correcting a mistake in the name of a party, or a mistake in any other respect;’ (Emphasis added.)”

See also *Kerver v. Virginia Chem.*, 145 F. 288 at 290; *Bueham v. Smelker*, 68 Pac. (2d) 946 at 949.

B. The Statement of Claim Adjuster Gripenstraw to Appellee's Attorney Could Not Be Relied Upon as a Binding Admission of the Fact of Permission.

As has been previously indicated, the conversation was *admissible* for another purpose.

Analysis of what was allegedly said by Gripenstraw shows that the *fact* of permission was not even admitted. His statement to Castro was *not* to the effect that Mehlin gave Claggett permission to operate the car. Careful scrutiny of the language quoted shows that he admitted only that there was "no question" about the permission. (Tr. pp. 86-87.) Next he purportedly said: "We are satisfied that Mrs. Mehlin had the permission to bring the automobile out here and that Mr. Claggett had *her* permission to use it" (Tr. pp. 86-87). It should be noted that there is no admission in such language that Claggett had Mr. Mehlin's permission. Indeed, all that is admitted is the fact that "we are satisfied" about the subject of permission. As long as the law regards verbal admissions with suspicion, with caution and as the weakest kind of evidence, the law should likewise strictly construe the language against the interested person who recites it from memory.

As a further basis for rejecting the statement of Gripenstraw as proof of the existence of a *fact*, we believe that the same reasoning used concerning superseded and amended pleadings is sound in its application to Gripenstraw's statements made under an obvious and uncontradicted misapprehension of facts.

Let us assume for the moment, without conceding, that Gripenstraw's statement went far enough to be evidence of a purported fact that Mr. Mehlin had previously given

permission to Claggett to operate the car. This Court has asserted that Gripenstraw had authority to make such an admission and could thereby bind the insurance company. We are somewhat alarmed at the broad implications to be drawn from the Court's statement that "a claim adjuster is not a person without implied power to talk. Talking is one of the things he is expected to do." Is it to be assumed, therefore, that such an adjuster can bind his principals by anything he says and with admissions of non-existent facts. An adjuster can talk, but he cannot "run off at the mouth." There are certain limitations on what a claims adjuster can do or say and thereby bind the company. Was not the burden of proving the extent of his authority placed directly on appellee before she could rely on his statements as binding admissions? No proof was offered by appellee other than the bare relation of conversations between Gripenstraw and appellee's attorney. Included in a discussion of settlement could be inferred, says this Court, the power to discuss permissive use. Does power to discuss include power to bind by admissions? If an adjuster attempted to advise a claimant of his legal rights or to state that there was or was not permissive use he would be accused of the illegal practice of the law. Whether or not permissive use existed was a *conclusion* to be drawn from facts. Even Courts and lawyers find this difficult at times.

Could Gripenstraw by his conversation bind Mehlin, the Company's named insured? Suppose we carried it a step further. Despite Mr. Castro's purported statement to Gripenstraw that there were only the issues of negligence and permission, there was in fact a third issue—agency. Suppose Mr. Gripenstraw had also said that there was no

question about the existence of agency and scope of authority. Could he thereby saddle the named assured and the company with full liability—although contrary to the fact? Is not the authority of Gripenstraw to bind anyone limited by the authority of the insurance company to bind or to involve its named insured? *If the insurance company could not itself do it, how could Gripenstraw do it?* The Company was acting on behalf of Mr. Mehlin, its insured, to protect his interests. Its obligation was to defend or to settle. At the time Gripenstraw was “talking” he was not representing the interests of the company on a *policy* question. His authority therefore was not delegated to him for any other purpose and his right to bind was then, at that time, only with reference to dealing on behalf of the insured. No policy coverage discussion was involved.

It is stated in the opinion that secret limitations on an agent's authority are of no avail. We are not concerned with such a problem in this case. The question is primarily one of complete lack of proof as to the extent of the agent's authority. One cannot state that a power has been restricted until one knows the extent of the power. To say that the power to offer money includes the power to bind the company by admissions of facts not within the personal knowledge of the agent is about as logical as saying that proof that Claggett was driving Mehlin's car is enough to establish that he was doing so with Mehlin's permission.

The opinion says: “When he was made a claim adjuster, he was given a character commensurate with that type of occupation and would have all of the apparent powers usually attaching to an agent of that type.” But we must

ask, where is there *any* evidence in this case to show the "character" of a claims adjuster or to show what powers "usually" attach to an agent of that type. Appellant offered the only evidence on that subject and it was clearly a limited authority. Mere talk by the agent himself cannot define the limits of his authority. See *Packet Company v. Clough*, 22 L. Ed. 406, *B & O v. Post*, 15 Atl. 885.

The very nature of the statement attributed to Gripenstraw made it inadmissible and not binding on the insurance company. The opinion of this Court, as it now stands, is contrary to California law and to a United States Supreme Court decision. It is apparent that Gripenstraw was making declarations concerning a past transaction at which he had not been present. He was attempting to characterize the effect of past conduct as amounting to permissive use under the California ownership liability statute. Such statements are not binding on the principal.

In *Borland v. Nevada Bank*, 99 Cal. 89 at 94, the Supreme Court of California held that an agent could not bind his principal by later characterizations of a transaction as "a purchase." The court said:

"The testimony of Grayson that at some time subsequent to the transfer of the stock Flood spoke of the transaction as a 'purchase,' cannot be used to determine the nature of the transfer. Flood, as the agent of the defendant, could not bind it by any admissions or declarations respecting the character of the transaction, which he might subsequently make in reference thereto. (*Beasley v. San Jose Fruit Packing Co.*, 92 Cal. 388.)"

Also, in *Taylor v. Bernheim*, 58 C.A. 404, 209 Pac. 55, it was held that an agent could not, after the transaction, admit away the rights of his principal.

In *Wilbur v. Emergency Hospital*, 27 C.A. 751, the Court states the California rule as follows:

“Over defendants’ objection, Mrs. Rosmer was permitted to testify that Miss Brown, the matron in charge of the nurses and an employee of the Emergency Hospital Association, instructed her not to tell Mrs. Wilbur about her son having drunk the bichloride of mercury. This was error and well calculated to prejudice defendants in the minds of the jurors. Not only was it in the nature of hearsay, but the suggestion made by Miss Brown in no wise tended to prove the issue as to whether or not Wilbur had drunk the solution. Moreover, it was a declaration concerning a past transaction as to which Miss Brown is not shown to have had any personal knowledge. ‘The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals; and this is doubly true where the agent was not a party to those occurrences.’ (*Insurance Co. v. Mahone*, 21 Wall. 157, (22 L. Ed. 593).) In *Beasley v. San Jose Fruit-Packing Co.*, 92 Cal. 388, (28 Pac. 485), it is said: ‘The declarations of an agent or servant do not, in general, bind the principal. To be admissible, they must be in the nature of original, and not of hearsay evidence.’ ”

The United States Supreme Court has clearly stated the rule in *American Life Ins. Co. v. Mahonè*, 22 L. Ed. 593. In that case a general traveling agent and supervisor of the insurance company expressed the opinion that the claim should be paid and that it would be best for the company to accept the situation and pay the amount of the policy. The Court said:

“That such an opinion allowed to go to the jury must have been very hurtful to the defendant’s case is

manifest, and that it was inadmissible is equally clear. The opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals; and this is doubly true when the agent was not a party to those occurrences."

Another valid reason for denying any weight to Gripens-traw's alleged admission is the rule mentioned by Wigmore, Third Edition, Vol. IV, page 17, Section 1055, where it is said:

"But when the admission concerns the main controverted fact in the case, and the opponent's admission is the only evidence offered, a few courts show an inclination to follow a general maxim that it is insufficient, at least, when the admission is one of conduct only."

It will be recalled that in our case *no direct evidence of permission was offered by appellee*. The only direct evidence on the subject was produced by appellant. Appellant's evidence negatived, without contradiction, any permission.

This Court's feeling that a jury could have drawn different conclusions because of the Mehrlins' possible motive for telling falsehoods flies directly in the face of the California Supreme Court decision of *Engstrom v. Auburn Motors*, 11 Cal. (2d) 64. Regardless of the rather tenuous suggestions for having a jury draw contrary inferences, the rule suggested by Wigmore has particular application to our case.

In *Berewicz v. Haglin*, 115 N.W. 271, after quoting Wigmore, it was said:

"An admission not based on personal knowledge may be admissible. (Citing cases) But an admission evi-

dently made without personal knowledge of the facts admitted, or a statement inconsistent and contradictory, indefinite or equivocal, and *not elucidated by further proof*, may have little or *no* weight as evidence. (Citing cases) An admission of a mere legal conclusion is not binding.

* * * * *

“In so far as the admission concerned facts, they were not within the defendant’s personal knowledge. In so far as the admission concerned law, it cannot be determined whether the opinion was or was not erroneous.”

Similarly, in our case, the opinion as to permission was “a mere legal conclusion” and not binding.

A case closely analogous to ours is *Jones v. Harris*, 210 Pac. 22 (Wash.). There a conversation related to an admission that the driver to whom a car was entrusted had been a known reckless driver. There was also an admission of permissive use. There was no direct evidence offered to back up the alleged admissions. Other evidence offered was direct evidence contradicting the admissions. The direct evidence was subject to the same conflicting inferences as were suggested by this Court in its opinion. Also, in the *Jones* case, “It was urged that the admissions alone were sufficient to carry the case to the jury.” The Washington Court held that the admissions were not sufficient. After quoting *Greenleaf* and *Jones on Evidence* and *Stephens v. Vroman*, 18 Barb. (N. Y.) 250, re such admissions, the Court said:

“They (admissions) are not by any means conclusive, and not necessarily even *prima facie* evidence of the fact to which they relate. . . . An examination

of the cases on the question collected in 22 C.J. 290, et seq., will show that the courts themselves, when they have been the trier of the facts, have generally refused to give such evidence credence when contradicted and *unsupported by any corroborating circumstance, and this even where the witness testifying was not a party to the cause*, and otherwise had no apparent reason for misinterpreting or misstating the admissions to which he testified. . . . Mr. Harris is made by the purported admissions to state as a fact matters which he then knew not to be a fact, and matters which the evidence subsequently developed not to be a fact. . . . It cannot be said to rise to the dignity of evidence; if it were otherwise, the citizen's right of personal liberty and right of private property stands upon a very shadowy foundation."

Even if the warrant for arrest issued *before the accident* is not convincing, and even if the sworn testimony of Mrs. Mehlin is disbelieved (despite the fact she could not be held liable either as owner or as principal), such evidence is direct and contrary to any inferences of permission. Take it all away, and there is still no evidence of permission.

This court indulges in some rare speculations in footnote 13 at page 15. Without any evidence to support it, the thought is expressed that probably Mrs. Mehlin was to be permitted to drive the car back to Nebraska while in custody of her mother. The mother was *not* deputized by Mr. Mehlin (Tr. 142). The car was later wrecked and was not in a condition to be driven (Tr. p. 132). The supposed permission to drive home *after* the accident

would have no bearing on the extent of any permission to drive away from home with strange men *before* the accident.

Not only must there be *proof* of permission, it must not be speculative. *Wilbur v. Emergency Hospital*, 27 C.A. 751 at 759.

“A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such nature and so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent merely with that theory, for that may be true and yet they may have no tendency to prove the theory If other conclusions may reasonably be drawn as to the cause of the injury from the facts in evidence than those contended for, the evidence does not support the conclusion sought to be drawn from it. Verdicts must have evidence to support them, and the jury will not be permitted merely to conjecture how the accident occurred. In matters of proof they are not justified in inferring from mere possibility the existence of facts. If it appears that the facts and circumstances from which a conclusion is sought to be deduced, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for.”

This Court says, without any support for it in the record, that the filing of the complaint against Mrs. Mehlin “may have been initiated by something that transpired after Mrs. Mehlin had reached California.” The complaint was made by Mr. Mehlin *before* he even knew where his wife had gone (Tr. p. 129 and 133).

We can only reiterate what we have said in our brief, that this is not a case of conflicting evidence at all. There was no evidence of permission given to Claggett. Statements made were later explained by uncontradicted facts which had the effect of completely dispelling, as a matter of law, any contrary inferences, assumptions and admissions. It seems to us that this Court has completely ignored the effect of the decision by the Supreme Court of California in *Engstrom v. Auburn Motors*, 11 Cal. (2d) 64. In fact, *the Court has not even mentioned that decision*. Certainly that case involves testimony by interested parties, and it involves an even stronger situation of an initial grant of permission.

It is respectfully submitted that a rehearing should be granted in order to correct some rather serious misapplications of legal principles and in order to make the opinion of this court conform to the California cases and other well-reasoned decisions.

Dated: January 10, 1951.

DANA, BLEDSOE & SMITH

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CERTIFICATE OF COUNSEL

In my judgment the foregoing petition for rehearing is well founded. I hereby certify that it is not interposed for delay.

LEIGHTON M. BLEDSOE

